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Supreme Court,

FOURTH DEPARTMENT.

ANNA N. DWIGHT AND OTHERS, AS EXECUTORS,
&C., OF WALTON DWIGHT, DE-
CEASED, RESPONDENTS,

against

THE GERMANIA LIFE INSURANCE COM-
PANY, APPELLANT.

Statement and Points for Appellant.

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Respondents,

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THE GERMANIA LIFE INSURANCE
COMPANY,

Appellant.



STATEMENT AND POINTS FOR APPELLANT.

STATEMENT.

This cause comes before the General Term on appeals taken by the defendant from a judgment entered in favor of the plaintiffs on the 23d day of May, 1884, on the verdict of a jury; and from an order denying a motion made on the part of the defendant, before the Justice presiding at the Circuit at which the cause was tried upon the minutes of the said Justice to set aside the said verdict, and for a new trial upon the exceptions

taken by the defendant, and on the ground that the said verdict was contrary to the evidence and contrary to law.

Notices of Appeal, fols. 1 and 132.

The action was upon a policy of insurance on the life of Walton Dwight, the plaintiffs' testator, for \$15,000, issued by the defendant on the 28th day of August, 1878 (Policy Exhibit A, fol. 17). The application on which this policy was based appears in the Appendix as Defendant's Exhibit No. 21, at fol. 2364.

This application was one of thirty-two applications for insurance on his life, in sums aggregating about \$400,000, made by Walton Dwight to various Life Insurance Companies between the 31st day of July, 1878, and the 9th day of September in the same year, both dates inclusive, under circumstances to which the attention of the Court will be more particularly invited hereafter.

On these applications he actually succeeded in getting possession of policies aggregating two hundred and fifty thousand dollars of insurance. (See schedule attached to proofs of death, Exhibit "B," fol. 2249.)

The residue of the companies, to whom applications were made, were fortunate enough to get warning in time, and either promptly declined, or were able to stop their policies before delivery.

These several applications were generally on the basis of paying premiums quarterly. In some cases, however, the rules of the companies prevented the issue of policies on that basis.

This plan, though more expensive than any other for one who expected to pay more than one premium, would secure the largest amount of insurance by the payment of the smallest sum down.

Several defences were alleged in the defendant's

answer. They may be here briefly summarized as follows:

1. Alleged breaches of warranty,
2. The death of said Dwight by suicide,
3. The obtaining of the policy by fraud, and
4. That the obtaining of the said policy was in pursuance and execution of a scheme to defraud the defendant, and other insurance companies.

Answer, fols. 28 to 59.

The place of trial named in the complaint was Broome County. It was subsequently changed to the county of Chenango on the ground that an impartial trial could not be had in Broome County, the Court declining to send it for trial outside the Judicial District in which the plaintiffs resided.

Order, fol. 64.

An order was also obtained by the plaintiffs, requiring the defendant to serve a bill of particulars, specifying among other things the particular times and places at which the defendant expected to prove that Dwight had had bronchitis and spitting of blood, or either of them, and precluding the defendant from giving evidence on the trial that Dwight had had bronchitis or spitting of blood at any time or place other than as specified in such bill of particulars.

Order, fol. 67.

This order was modified by the General Term on appeal so as to admit evidence of Dwight's own declarations or confessions.

General Term Order, fol. 73.

The action was tried at the Chenango County

Circuit, before the Hon. David L. Follett and a Jury, at the November term in the year 1883.

The trial commenced on the twelfth day of November, and terminated in a verdict for the plaintiffs on the thirteenth day of December, 1883.

The defendant asks a reversal of the judgment on both the facts and the law.

Before discussing in detail the questions presented on these appeals it is believed that the labor of the Court will be facilitated by first for a moment considering the career of Walton Dwight as shown by the undisputed evidence in the case.

Walton Dwight, from the age of fifteen or sixteen to the age of twenty-five, appears to have resided at Cowdersport, Potter County, Pennsylvania, and to have been engaged more or less during that period of his life in lumbering. (Norman Dwight, fols. 1471-1474.) He entered the army in August, 1862, and resigned in March, 1864, shortly before the battle of "The Wilderness" (Reynolds, fols. 1487-1494). He did something in the way of lumbering in Elk County, Pennsylvania, in the winter of 1864 and 1865, and next appears at Williamsport, Pennsylvania, where he resided with his wife at the Herdic House, during the winters of 1865-1866 and 1866-1867 (Reynolds, fol. 1488; Forsman fol. 288; Herdic, fol. 321). While residing there and in the month of March, 1867, Walton Dwight was confined to his room from one to two weeks or more (Forsman, fol. 315; Herdic, fol. 322; Taylor, fol. 359). During that illness he was seen on more than one occasion to spit blood after coughing, which he declared proceeded from his lungs. The attention of the Court will be called hereafter to the specific testimony on this subject of eye-witnesses to the fact, and to Dwight's own declarations to several witnesses that he had had hemorrhages of the lungs. It appears that about this time Dwight had been engaged in getting up a company called the Williamsport and Canada Lum-

ber Company, to take the title to a tract of timber lands in Canada, an option to purchase which had been acquired by him; and that at the time of these hemorrhages he was expecting to go to Canada to make a payment for said company on account of the said purchase, which was necessary to be made by a certain day to prevent the loss of said option.

This circumstance fixed the date and the facts of the illness in question on the minds of the witnesses on this subject, most of them having been interested with Dwight in this lumber speculation (Herdie, fol. 324).

We next find Dwight at Binghamton, where in June or July, 1868, he made a settlement of substantially all his property on his wife, who in her capacity of executrix of his will is one of the plaintiffs in this action (Walton Dwight's Examination in Bankruptcy, fols. 401, 416, 417).

From that time down to the commencement of the Dwight House business he had no business of his own. In his own language, quoted from his sworn deposition in the bankruptcy proceedings (fol. 401): "I had not; not further than my law suits, general living and the like of that. I had no business of my own."

In the meantime improvements had been made upon the real estate at Binghamton, the title to which had been placed in Mrs. Dwight's name. The money for making these improvements appears to have been derived from mortgages. These were subsequently foreclosed and the whole property sold out thereunder, leaving large judgments for deficiencies. (See Exhibit "L," Appendix, fols. 2291-2292. Case, fols. 494 to 504.)

In May, 1874, Dwight opened the Dwight House at Binghamton and went into business there as a hotel keeper, and continued that business until March 8th, 1877 (fol. 401). The business of selling wines and liquors by the package, in connection with the hotel business, was carried on by Dwight dur-

ing the whole period (Armstrong, fols. 391 to 393 ; Dwight's examination, fols. 397 to 400). This hotel business proved no greater success than the previous speculations in which Dwight had been engaged. In December, 1876, he appears to have gotten to the end of his resources. The assets of his wife and himself together did not then exceed, if they equalled, his liabilities. We find him under date of December 15th, 1876, proposing to the President of the First National Bank of Binghamton, in a communication enclosing a schedule of his assets, and encumbrances existing thereon, to transfer to the bank all property owned or held by him, excepting only life insurance, in consideration of the bank's cancelling and releasing its claims against himself, his wife and one George B. Edwards, his clerk (Case, fol. 408 ; Appendix, Exhibit "L," fols. 2284 to 2299). Immediate action was then necessary, as the interest on the mortgages was already in arrear, and the days of grace for the payment thereof would expire December 31st, 1876 (fol. 2302).

His condition was then so desperate that he had offered to release to his brother his interest in his father's estate upon the following condition, again quoting Dwight's own testimony (fol. 403) : "Provided you will advance to my wife and boy for living purposes a sum not to exceed \$5,000, and you shall advance that at the rate of a thousand dollars a year for five years or thereabouts, or until such time as I could start in business again, and can shift for myself."

On March 8th, 1877, Harper Dusenbury, a relative, having taken possession of the Dwight House under legal process, Walton Dwight was driven out. The resources of the family at that time, according to Dwight's own testimony, were reduced to less than ten dollars.

To quote again his own language : "I can swear I took less than eight dollars, and my wife told me

“ she had less than two dollars, and that is every dollar I had on the face of the earth that I know of ; I know I borrowed money right along from my brother Ward to pay my hotel bills at the “ Spaulding House ” (fol. 407).

In the following month, (April 7, 1877,) a petition in involuntary bankruptcy against Walton Dwight—his wife appearing as a petitioning creditor—was filed in the Clerk’s office of the U. S. District Court for the Northern District of New York (fol. 419).

He was adjudicated a bankrupt May 1, 1877, and the adjudication was filed May 7, 1877.

Charles A. Hull and E. M. Fitzgerald were appointed assignees June 7, 1877 (fol. 430), and certified under date of August 8, 1877, that no assets had come to their hands as such assignees, or on account of said estate (fol. 445).

August 4th, 1877, Dwight filed his petition for his discharge from his debts (fol. 444).

Specifications in opposition to his discharge were filed on behalf of several creditors (fol. 448).

An examination of Dwight before Mr. Register Bowe was commenced December 18, 1877 (fol. 396), and continued from time to time till February 19th, 1878, when the examination was subscribed and sworn by the bankrupt (fol. 418).

On July 30, 1878, the briefs and papers, on the application for the discharge, were submitted to the Register (Pine’s affidavit, fol. 452).

The proceedings on this application being thus perfected as far as possible, the bankrupt proceeded at once to business.

He appears to have concocted a scheme for obtaining the largest possible amount of insurance on his life attainable by the least possible amount of money down, without reference to the comparative costliness of the plan, assuming that more than one payment of premium was to be made.

Not allowing a day to pass—the application for discharge having been submitted, as already shown,

July 30, 1878,—we find him, under date of July 31, 1878, making applications to the Mutual Life Insurance Company of New York and to the Connecticut Mutual Life Insurance Company, for policies on his life to the amount of \$25,000 in each company (Exhibit 1, fol. 2308, and Exhibit 6, fol. 2322, Appendix).

The attention of the Court is called, in passing, to the fact that in this first application to the Connecticut Mutual Life Insurance Company, to the question as to whether he had ever had spitting of blood, he was very particular in his answer. His answer to that question was: "No; only from the "teeth." In his subsequent applications he contented himself with the simple answer "No."

Commencing with the said 31st day of July, the business of obtaining the largest amount of insurance possible on his life was prosecuted with unremitting energy and activity down to the 9th day of September, a period covering exactly thirty-five working days, and in that time he made thirty-two applications for insurance, aggregating \$400,000. Abstracts of these several applications appear in the Appendix.

At the usual rate of \$86.70 per quarter year, for \$10,000 of insurance at age of forty-one, had these applications all been successful, he would have been assuming a liability to pay \$13,872 per annum for premiums on life insurance. To have secured this amount of insurance, assuming that his purpose was to pay only one quarterly premium, and then to die before the next quarter's payment should mature, would have taken in cash down \$3,468.

In point of fact he got into his possession policies for \$250,000 by the payment of about \$2,167.50.

His financial condition at this time has already been pointed out. He was overwhelmed with debts. His assignees in bankruptcy had certified that no assets of any description had come into

their hands. His brother Ward had been paying his board bills at the Spaulding House, as sworn by Dwight in the bankruptcy proceedings as late as February, 1878 (fol. 407).

For the purposes of this insurance scheme Dwight availed himself of the services of an attorney, Neri Pine, of Binghamton, who examined the policies on his behalf, and also signed some of the statements attached to certain of the applications as a friend of the applicant (Pine, fol. 1442). Pine also attended to the payment of premiums on the policies received.

The funds to pay these first premiums came partly from T. F. McDonald, a brother in law of Dwight, and partly from the proceeds of the discount of a note made by Dwight and endorsed by Neri Pine and T. F. McDonald. This note was not paid at maturity but renewed. Whether the renewed note was paid or not the witness could not state.

Pine, fols. 1447 to 1458.

It thus appears that Dwight had not means of his own with which to pay the first quarter's premiums upon the policies actually obtained, but had to borrow money for that purpose.

Exhibits 100 to 106, fols. 2651 to 2665,
Appendix.

In the execution of this scheme Dwight further availed himself of the services of at least two expert insurance agents or brokers, viz., Henry C. Hermans, of Binghamton, and Norman W. Batchelder, of Albany. He wanted each to obtain insurance for him to the amount of about \$100,000.

Batchelder, fols. 633, 636 ; Hermans,
fol. 1509 ; Exhibit 108, fol. 2673.

By August 26th some of the companies to which applications had been made, and which had at first

been disposed to issue policies, commenced to take alarm, and endeavored to prevent the delivery of their policies. Dwight's determination to get possession of all the policies possible was not, however, to be thwarted, if the perpetration of any fraud would prevent.

The general agent of the Union Mutual Company at Albany had entrusted Batchelder with a policy of his company to deliver on receipt of the premium. Batchelder met Dwight in New York and showed him the policy. Dwight did not wish to pay the premium then, and asked Batchelder to retain the policy until he received others which he expected. While this policy remained in Batchelder's possession, and before Dwight had accepted it or paid the premium, Batchelder received a telegram from the general agent instructing him to return the policy if not delivered. He showed this telegram to Dwight, who said it was all foolishness, and took Batchelder to the telegraph office, and there dictated and had him send two false despatches, one to the General Agent at Albany, and the other to the President, at Boston, to the effect that the policy had already been delivered, and that Dwight had settled the premium.

Batchelder, fols. 640 to 646 ; Exhibits 52, 53 and 54 ; fols. 2488 to 2491.

This policy was not actually delivered or the premium paid until September 6th, eleven days afterwards.

Batchelder, fols. 648, 650 ; Exhibits 55 and 56, fol. 2491.

In order to make these policies which were being gathered up available, it was necessary that the plaintiff, Mrs. Dwight, should get rid of her own debts, judgments to a large amount having been recovered against her.

Accordingly we find her, under date of August

25, 1878, verifying a petition for her own discharge as a voluntary bankrupt, which petition was filed August 27, 1878.

The proceeding thus inaugurated was prosecuted to a decree for discharge, filed January 22, 1881.

Neri Pine, who acted as attorney for Mrs. Dwight as petitioning creditor in the involuntary proceedings against her husband, and in the same proceeding as attorney for the bankrupt, also acted as attorney for Mrs. Dwight in the application for her own discharge.

Mrs. Dwight's Proceedings in Bankruptcy, fols. 461 to 493.

Applications for insurance having been scattered broadcast through the land, and no more companies remaining to which to apply, we find Dwight in September at Windsor, where his wife was living with her father. Some of the companies from which policies had been obtained began by this time to discover that a fraud had been perpetrated on them, and that statements made in the applications, on the basis of which the policies had been issued, were untrue, particularly those relating to his previous condition of health. They decided at once to tender back the premiums paid and demand back their policies.

Amongst the companies which took this course were the Washington and the United States.

In the first week of September, 1878, E. S. French, the superintendent of agencies, and Levi C. Phillips, who had acted at Binghamton as the local agent of the Washington Life Insurance Company, went to Windsor, and there had an interview with Dwight. Dwight then professed to be in perfect health. Mr. French then and there tendered Dwight the premium paid on the Washington Company's policy, and demanded back the policy.

He told him the reason for the demand was misstatements in the application in relation to his

health; that he had learned since sending the policy that Dwight had had spitting of blood, etc. Dwight acknowledged the truth of Mr. French's statements, but insisted that he was perfectly sound then. He declined to give up the policies, alleging, as a reason, that if he should do so, other companies would learn the fact and go back on him and that he couldn't get other insurance that he intended to get. He said the Washington Company was "all right," and asked them to say nothing about it.

Phillips, fols. 549 to 553.

A similar tender and demand were made by Nat. B. Freeman on the part of the United States Life Insurance Company, at Windsor, on October 5th, 1878, with like results. This visit had been preceded by written demands under dates respectively of 21st September and 3d October.

Freeman, fols. 526 to 532.

Exhibits 48 and 49, fols. 2475-2479.

Exhibit 56, fol. 2480.

Exhibit K, fol. 2277.

Another like tender and demand were made by George W. Thompson on the part of the New England Mutual Life Insurance Company, at Windsor, October 7th, 1878, with like results. In answer to a charge of falsification in his application, in that he had denied having had spitting of blood, he said, "he had never spit any more blood than came from the prick of a tooth-pick."

Thompson, fols. 1046 to 1051.

Exhibit 98, fol. 2649.

Dwight's attention was called to the same subject of blood-spitting by the Mutual Benefit Life Insurance Company on September 19th, by letter of that date. He replied to this letter under date of 23d September. On further investigation, this

company, by letter dated October 7th, demanded return of their policies and offered to return the premiums.

Exhibits 93, 94, 96, fols. 2640 to 2646.

The next step in the order of execution of Dwight's scheme, having secured all the insurance which it was possible to obtain, was to make a will.

At some time in the month of September, but at what precise date does not appear, he executed an instrument purporting to be his last will and testament.

Exhibit 92, fol. 2599.

A careful perusal of this instrument affords the most cogent proof of the fraudulent motives and designs of this man, and so discloses the scheme to defraud the insurance companies which he was elaborating as to leave no doubt of its corrupt character.

He begins by an explanation of his reasons for making no provision for his debts, except a list of petty amounts due to various persons, consisting of such items as the following :

H. W. Carl, \$1 ; Mason, Pratt & Co., \$1.75 ; T. P. Goodrich, \$1.80 ; John D. Ames, \$1.60 ; S. W. Barrett, \$2.00.

This man, who alleges later on in the same instrument that since his failure his earnings had averaged over 10,000 dollars for twelve months, was not able to provide for pressing demands of creditors whose debts did not exceed \$2.00, except by will.

Of course this allegation as to his earnings had no foundation in fact and is at variance with all the proofs in the case.

He next proceeds to prepare for the legal contest which he well knew would arise when any attempt should be made to collect any of the policies of life

insurance which he had succeeded in getting into his possession.

He provides in a liberal way for the Bench and Bar of Broome County.

Of course he entirely misunderstood the character of Judge Martin in assuming that he could be in any way induced to become a party to such a scheme, or influenced by any consideration of personal emolument—but this was a contingency that Dwight does not seem to have been capable of comprehending.

After making some provisions for relatives and former employees, he proceeds to endeavor to interest in his favor all classes of the community in which he expected this legal contest to arise.

He makes provision for an annual dinner for every poor family in Binghamton, making the distributors of this provision “a committee to be appointed by all the clergymen, ministers and “priests who are residents of and have charge of a “church or congregation in Binghamton or a “majority of them, embracing all denominations “in assembly.”

Then he provides for Sunday school books for all the churches in Windsor.

Next for the Binghamton Library Association ; next for the press of Binghamton ; next for the Fire Department.

It will be seen that by these provisions there was hardly a juryman in Broome County for whose favor a bid was not made in this remarkable document.

These several provisions, contained in the first twenty articles of the will, would require together about seventy thousand dollars of his insurance to satisfy them, but by reference to the concluding part of Article “Twenty-fifth ” (fol. 2636), it will be seen that in case the whole amount of insurance covered by the policies he had obtained should not

be collected, each and every of these bequests was to be scaled down accordingly.

He next gives seventy-five thousand dollars of insurance to his son and the residue to his wife.

In the "twenty-fifth" article, having admitted that his estate "is made up most entirely of life insurance," he proceeds to make an argument to satisfy the incredulous that he expects to be able to pay future premiums.

It is needless to say that his premises are entirely false.

The evidence shows that his speculations, one after the other, had failed.

Even his great Canada lumber speculation, according to his own sworn statement, had realized nothing (fol. 414). At forty-one years of age he found himself a financial wreck—with no profession, no capital, prestige gone—with debts to various persons not exceeding \$2.00 each outstanding, his obligation to pay which he acknowledged, and provision for which out of the moneys to be obtained on life insurance he made by will, but which he was unable to meet in cash—his board bills paid by his brother Ward. This was his financial condition on July 31, 1878, when he started to put in execution his insurance scheme, applying for \$400,000 of insurance, involving an annual outlay of over \$13,000.

He was a man who had always lived extravagantly. At fol. 413 he says his living expenses were over \$18,000 one year. To him the idea of poverty was intolerable. In his own language, as testified by the witness, Whitney, "A man might as well be in 'h—ll as to be poor'" (fol. 862).

His experience had been such as to elicit from him the confession to the witness, Phillips: "If 'my family were only provided for, I would have 'no desire to live'" (fol. 548).

The same despondent feeling crops out in his will, where he says in spite of himself, "I have lived

“to that age, and been subject to such experience,
 “that I have no farther ambition for myself, be-
 “yond leaving my family comfortable, and with
 “sufficient means to enable them to live as they
 “were in the habit of heretofore.” * * *

He had attempted to make this provision, by getting all the policies on his life which he could secure by the payment of a single quarter's premium—borrowing the money for that purpose.

He had no means or prospects of earning the money to meet the second quarter's premiums, which would begin to fall due on the 19th of November then next.

Should he survive that date, his Herculean efforts would have been expended in vain.

He had done what he could by his will to prepare the way for a successful issue to the legal contest, which he foresaw, and now he must prepare for the end.

He must lay the foundation for a claim that he was sick, to support a later claim of a natural death.

He could not go yet, for no decision had been rendered on his application for a discharge in bankruptcy, but he must be prepared, as the time was growing short.

He narrated to Dr. Porter, who visited him in Binghamton on November 7th, 1878, to what he attributed his then alleged illness. We quote from Doctor Porter's testimony (fol. 673). Dwight said,
 “That in the fall, or in the last season he had been
 “at Windsor, his former home, and that while
 “there he had for several weeks been engaged in
 “partridge shooting, rambling over the hills, and
 “drinking surface water of brooks and sometimes
 “of swamps, and oftentimes it was none of the
 “best; that after a time he felt unwell, and after a
 “time he complained of pain and nausea, and
 “general discomfort; that he then went to Bing-

“hamton and consulted with Doctor Burr, who
“has since been in attendance upon him.”

This course of procedure was continued until he left Windsor for Binghamton in October (Owen, fols. 578 to 582).

We next find Dwight in Binghamton. He left Windsor and went to Binghamton between the 8th and 13th of October. Thompson found him at Windsor October 8th (fol. 1046); Burhans found him at Binghamton October 13th, meeting him on that day in the street (fol. 868). On the 14th he was informed that Dwight had gone to New York. On the 15th, Burhans found him in his room in the Spaulding House. Dwight then said he was feeling sick (fol. 869). Burhans' application for the return of a policy met with the same fate as those of his predecessors (fols. 870, 871).

From that time forward to November 15th, Dwight remained at the Spaulding House, claiming to be more or less sick. Though he claimed to have had congestive chills at intervals of seven or eight days, and had Doctor George Burr, since deceased, and his son, Doctor Daniel S. Burr, and Doctor Orton, who acted for him in the dual capacity of insurance solicitor and physician, visiting him from time to time, and though both Daniel S. Burr and Orton were examined as witnesses on the trial on the part of the plaintiffs, no physician on the witness stand ventured to suggest that he had ever seen Dwight in a chill, or to give any testimony as to what was the matter with him or what was the cause of his death.

The extraordinary feature of this silence lies in the fact that the plaintiffs' counsel, having proposed to interrogate the doctors on this subject, and the Court having overruled the defendant's objection to the proposed testimony, based on the provisions of the Code as to the testimony of physicians on matters coming to their knowledge in the course of professional attendance upon a patient, the wit-

nesses were permitted to leave the stand without being asked a question on that subject.

The theory of Dwight's having had congestive chills or any form of malarial fever was absolutely disproved by the medical testimony introduced by the defendant, based on the undisputed facts in evidence.

Even a layman of ordinary understanding would find it difficult to believe that any one could have been suffering four or five weeks from malarial or any other fever, of even the mildest type, without any noticeable change at any time, in either his pulse or temperature.

On the 7th day of November, Doctor Charles H. Porter, of Albany, at the request of the agent of the Union Mutual Insurance Company of Maine, whose policy had been obtained by Dwight after notice that it had been recalled under the circumstances hereinbefore stated, visited Dwight at the Spaulding House in company with Doctor George Burr.

The object of Doctor Porter's visit was fully understood. He went to ascertain what was the matter with Dwight, whether he was engaged in trying to destroy himself.

The result of his examination appears in his testimony at fols. 671 to 687.

The Court will draw the necessary distinction between Dwight's own statements on this occasion and what the witness himself observed.

The only symptom of disease observed by Doctor Porter was an apparent feebleness of circulation (fol. 677).

At fol. 685 Doctor Porter testifies that the morphine which Dwight stated had been administered to him would be sufficient, in the doctor's opinion, to account for the feebleness which he observed in Dwight's circulation, an opinion which was shared by all the other experts. Gelseminum also would produce the same result (Wood, fol. 945).

The conclusive answer to any suggestion that Dwight was suffering from any malarial or other fever, or had had any congestive or other chill, is found in Doctor Burr's statement to Doctor Porter as to Dwight's pulse and temperature during his alleged illness. We here quote from Doctor Porter's testimony (fol. 686):

"The only other point that at this moment I recall was in reference to the temperature and pulse during the course of Col. Dwight's illness. Making an inquiry in regard to those points, Dr. Burr stated that his temperature was always about normal, and I think he used, or I think he stated, although not in those words, but in similar terms, that his pulse was always about normal and natural."

If any further evidence on this subject were necessary to satisfy the most obstinate unbeliever, it can be found in the unanimous testimony of all the experts as to the pigmentation or coloring of the liver and other organs which is always produced by disease of this character, and the absence of any such appearance in the organs of Dwight, when examined at the autopsy held fifty-two hours after his death.

Orton's cross-examination, fols. 1856, 1857; Wood, fols. 959 to 961; Bridges, fol. 1030.

The subjective symptoms complained of by Dwight, of pain in the abdominal region, and nausea, are also perfectly accounted for by the medical testimony as to the effects produced by Fowler's Solution of Arsenic, which was being administered to Dwight (Wood, fol. 945).

Another curious feature about this so-called illness is the fact that, while several persons came on the stand and testified that they had at different times sat up with Dwight during the night, no one of them had any experience as nurse or received

any intimation as to what to do in case of need in the way of administering remedies or otherwise. Nor did any witness produced ever have any instructions to administer any medicine whatever.

These were McDonald, Dwight's brother-in-law (fols. 1349, 1383 to 1387), Downs, McDonald's law partner (fols. 1331, 1339), Hermans, the insurance solicitor who made applications for about \$100,000 insurance on Dwight's life to different companies (fol. 1538), and Charles A. Hull, cigar manufacturer, formerly McDonald's law partner, who was also Dwight's assignee in bankruptcy (fols. 1251 and 1275).

To the person last named, the attention of the Court will be invited later in another connection.

On the sixth day of November, Dwight was informed that the Register had made a report in favor of his discharge in bankruptcy (Pine, fol. 1415).

The second quarter's premiums on the policies he had gotten into his possession would begin to be payable, according to their terms, on November 19th, or less than two weeks after his discharge had been secured (see policies of Washington Life Insurance Company, Exhibits 75 to 82, fol. 2556).

There was therefore no time to be lost ; what remained for him to do must be done quickly.

Evidence of his being sick to sustain the theory of death from natural causes must be prepared.

The doctors could not be relied on for such purpose.

Downs is there with him on the night of the same 6th November, and again on the 8th. What Dwight said and did on those nights is detailed by the witness. That Dwight had one or more vials containing some kind of drug within reach is admitted (fol. 1340). The witness did not feel his pulse (fol. 1334).

On Wednesday evening, November 13th, Charles

A. Hull visits Dwight. An arrangement is then made between Dwight and Hull for Hull to sit up with him on the night of Friday, the 15th. Dwight desired him to be there on that particular night, because he knew Hull "*would be cool in case anything should happen*" (fol. 1266). That "was the time when *his chills, as he termed it, would return*, in case it came at all."

Friday, the 15th day of November, the fourth day preceding the day when the policies would begin to lapse for non-payment of the second quarter's premium, should Dwight then be alive, was then fixed as the date for his last so-called chill.

The critical Friday came. No provision had been made for raising any money to pay the premiums due on the following Tuesday.

The history of this Friday, with the exception of the hour and a half between 9:30 P. M. and 11 P. M., is given by Mrs. Owen, the sister of Mrs. Dwight, commencing at fol. 585.

He was out in the sitting room during the day, partially dressed.

In the morning a barber came and trimmed his hair. Dwight ate his dinner. He transacted some business with his lawyers. A Mr. Sears called to see him. He verified an answer, setting up his bankruptcy proceedings as a bar to a personal judgment for a deficiency in a suit pending against him, brought by the Superintendent of the Insurance Department.

Pine, fol. 1461; Exhibit No. 107, fol. 2666; Loomis, fol. 506.

According to Loomis, Dwight "seemed to be clear in his mind, and spoke readily and freely. He seemed quite strong, that is, comparatively strong. I observed no difficulty about his speaking; his voice was quite full, I think" (fol. 507).

At half-past nine Dr. D. S. Burr called, remained only a few minutes, chatted with Dwight and left. Dwight said he thought he was going to have a good night. Shortly after the Doctor's visit Mrs. Dwight and her sister said "good night," left Dwight's room and went to another room on the opposite side of the hall; both made their toilet for the night, went to bed and went to sleep, leaving Hull alone with Dwight (fol. 589). About eleven o'clock there was a knock at the door. Mrs. Dwight arose and went to her husband's room; Mrs. Owen followed in a minute or two (fols. 590, 598). When Mrs. Owen reached the room occupied by Dwight she found there Hull, Spaulding, the hotel proprietor, and Mrs. Dwight, no one else (fol. 592). Spaulding was trying to give him brandy (fol. 594). Then Spaulding said he didn't swallow it, and then his hands were put into hot water. According to Mrs. Owen, Dwight never spoke or moved or gave any sign of life after that time (fol. 595).

The undertaker and doctor were sent for and arrived about the same time. As nearly as Mrs. Owen could fix it, the time of their arrival was from half an hour to an hour after the knock at the door of Mrs. Owen's room (fol. 597), which would be between 11:30 P. M. and midnight.

Mrs. Dwight and Mrs. Owen then retired to another room where they spent the rest of the night.

Between 9:30 P. M. and 11 P. M. of that night, so far as disclosed by the evidence, no one held any communication with Dwight, or saw him alive except Hull.

It is true that Lee, the porter, who brought the hot water after Mrs. Owen had arrived on the scene, and who could not have gotten near enough to observe, testifies that he thinks he saw Dwight breathe—but that is at variance with the testimony of the other witnesses.

Lee also says that Spaulding was holding Dwight's tongue with his fingers (fol. 1722).

Dwight's chin had dropped on his neck (fol. 1730).

Two striking circumstances are disclosed by the plaintiffs' evidence :

1st. Dwight's tongue was protruding and was being handled by Spaulding. Why?

2d. His hands were being bathed in hot water. Why?

If his death had been produced by strangulation it would have been not unusual to find the tongue protruding somewhat.

If his death had been produced by strangulation it would have been not unusual to find the hands clinched, and the use of hot water would have helped to straighten them.

Attention is here called to the fact that neither Mrs. Dwight nor Spaulding, the hotel keeper, was called by the plaintiffs.

They rested their case on this vital question wholly on the testimony of Hull and Lee.

On Monday morning, about fifty-eight hours after Dwight's death, an autopsy was held on the body of Walton Dwight, under the auspices of his own physicians, who invited whom they desired (fol. 1821).

Fifteen doctors attended this autopsy. The dissection of the body was made by Dr. Delafield, Dr. Daniel S. Burr acting as secretary, and making notes of the appearance of the body and the several organs as the autopsy proceeded. At the close of the proceedings these notes were signed without protest or objection by all the fifteen physicians present (fol. 1659).

The original notes of this autopsy were used on the trial, and admitted in evidence for the purpose of showing that some of the witnesses had made

statements inconsistent with their testimony delivered on the stand, but were not admitted as affirmative evidence of the facts stated therein.

Charge, fol. 2169.

A *fac simile* of these notes appears in the appendix, after fol. 2382.

Some interlineations appear in these notes. On the first page the Court will notice that the name "Dr. Swinburne" is interlined over the name of "Dr. Ayer," near the foot of the page. Also near the foot of page 6 the word "cicatrices" appears to have been originally written, a line drawn through it afterwards, and "nodules" interlined above.

Dr. Swinburne attended this autopsy at the request of Professor Porter, the physician of one of the companies interested. He was the only physician present representing any one of the contesting companies (fol. 766).

The first interlineation above mentioned, occurring near the foot of page 1 of the notes, Dr. Swinburne testified on the trial had been made after the notes had been read over and signed (fol. 831).

The first fact of importance noted at the autopsy was the existence of "a heavy indentation extending upward and backward from os hyoides to right around back of neck, and on left side below the thyroid cartilage, running upward and backwards at about an angle of 45°."

Attention was called to this by Dr. Swinburne.

In connection with this heavy indentation on both sides of the neck, the attention of the Court in passing is called to certain conditions of various parts of the body disclosed on this autopsy, as bearing upon the cause of death.

Page 2. "Small ecchymoses in skin of back and shoulders."

Pages 3 and 4. Condition of brain.

Page 5. Adipose tissue and muscle. Lungs *unduly inflated*.

Pages 6 and 7. Bronchi CONGESTED AND COATED WITH MUCUS ; LUNGS CONGESTED AND ŒDEMATOUS.

Pages 7 and 8. Condition and contents of heart.

Page 8. Spleen NORMAL IN COLOR AND CONSISTENCE—undigested food in stomach.

Page 9. Existence of fœces in intestines.

Page 11. Liver CONGESTED, NORMAL IN COLOR AND CONSISTENCE.

Page 11. Kidneys CONGESTED, *no evidence of disease*.

The deductions made by the experts from these conditions will be referred to hereafter.

The accuracy of this report, as to the conditions mentioned, no witness presumed to controvert. An attempt was made to account for the heavy indentation in the neck, on a theory, the mere statement of which is sufficient to refute.

At the conclusion of this autopsy the body was interred.

About five months later, in April, 1879, the body of Dwight was exhumed, and a coroner's inquest held thereon.

The same indentations on both sides of the neck, which were pointed out by Dr. Swinburne, and observed by the fifteen doctors present at the first autopsy, still existed, and were plainly visible.

Dr. Swinburne says (fol. 784): " We examined carefully this same indentation in the neck. It was then plainly perceptible, but not quite as plainly as at first. I felt it at that time and examined it carefully, and the same peculiar condition which appeared before at the bottom of the indentation, was present—that sort of leathery or hardened feeling. The color of the

“ skin had changed, but still the bottom of the indentation was a little different from the other.”

Dr. Sherman, at the inquest, called the attention of the coroner and jury to this furrow or indentation of the neck, put his finger into it and describes it (fol. 969).

Nat. B. Freeman, who was present at the inquest, examined the neck—put his finger into the furrow or indentation in question, and describes its appearance and feeling (fol. 1017).

Dr. Bridges was present at the inquest ; observed the furrow upon both sides of the neck ; passed his finger through it, and describes its appearance and feeling (fol. 1022).

Albert D. Hitchcock was present at the inquest, and observed the groove or mark in the neck. He describes its appearance and direction (fol. 1155).

On the trial an attempt was made by the plaintiffs to diminish the force of the admissions made by the fifteen doctors at the autopsy, as to the extent of this heavy indentation on both sides of the neck. Drs. Hyde, Burr, Chittenden, Orton and Richards were examined on this subject.

Dr. Hyde, at fol. 1588, being interrogated in a somewhat peculiar manner, says all he saw was a little fold in the skin *and flesh*.

On his cross-examination, however, at fol. 1595, having been confronted with the notes of the autopsy bearing his own signature, he was obliged to admit that he heard the notes read over after they were finished, expressed his satisfaction with them, and that that satisfaction still remained, and that there was nothing contained in these notes to which he dissented then or at the time of the trial.

Dr. Burr, one of Dwight's own physicians, who

acted as secretary at the autopsy and wrote the notes which were afterwards signed, at fol. 1676, admits the existence of the heavy indentation or fold pointed out by Dr. Swinburne. At fol. 1679 he admits the continued presence of these indentations, at the inquest held the following April.

Dr. Chittenden saw these indentations, and heard Dr. Delafield direct Dr. Burr how to enter them on the notes (fol. 1739). On cross-examination he also was compelled to admit that this depression in the neck, which was noted as a heavy indentation, extended below the skin itself, into the fatty tissue of the neck (fol. 1788).

Dr. Orton, one of Dwight's physicians, and who had also acted as solicitor in obtaining insurance for him on his life, on his direct-examination speaks of these heavy indentations as *folds of the skin and immediate tissues below* (fol. 1813).

The attention of the Court is particularly invited to the cross-examination of this witness on this subject (fols. 1834 to 1847 and 1858 to 1861 and 1865). A perusal of his entire cross-examination would be very instructive.

Dr. Richards, the coroner, was present at the autopsy. His attention was called to something—"he hardly knows what to say about that, whether it was a groove or what it is" (fol. 1871). Later on he speaks of these heavy indentations as "a couple of creases on each side of the neck" (fol. 1873). He says he cannot describe them.

It should be borne in mind that this testimony of the plaintiffs was given after the defendant's case had been closed, and after the absolute demonstration by the evidence of the experts called by the defendant from the presence of these indentations in the neck in connection with the ecchymoses on the back and shoulders and the con-

dition of the internal organs that "it is not possible that the man could have died of anything else than strangulation by a cord" (fol. 914).

It is now proposed, as briefly as may be, to call attention to this expert evidence which it is claimed amounts to a mathematical demonstration that Dwight did not die from any natural cause, but from strangulation produced by mechanical means.

The Court limited the expert testimony to six witnesses on each side upon any one point.

The defendant's witnesses on the subject of the cause of death were the following :

1. *Dr. Charles H. Porter* of Albany. He was first called to prove Dwight's condition, November 7th, 1878 (fol. 670).

The foundation having been laid, by the testimony of other witnesses, for his opinion as an expert, he was recalled (fol. 1069), and in answer to a hypothetical question, based on the facts in evidence, answered as follows (fol. 1073) :

A. "In my opinion the immediate cause of death was asphyxia—mechanical asphyxia—and from having it stated that there were furrows or grooves about the neck of the character described, in my opinion the cause of death was by strangulation —hanging."

2. *Dr. John Swinburne* of Albany, whose experience and qualifications as an expert are detailed at fol. 763.

Dr. Swinburne was present at the first autopsy in November, 1878, and at the inquest held in April, 1879. He details with great particularity what he observed on both those occasions. At fol. 775 he describes the congested and engorged condition of the lungs, and certain spots filled with air "as though the air cells were burst"—in scientific language, "Emphysema of the lungs." Also,

at fol. 776, he mentions the presence of bloody mucus in the bronchi ; at fol. 772, the presence of a clot of recent origin on the exterior membrane of the brain ; at fol. 788, he gives his opinion as an expert, based on his personal examinations of the body, as to the cause of death. In his opinion death did not result from natural causes, but did result "from strangulation with a rope."

The grounds of this opinion are set forth at length in his testimony.

3. *Dr. Horatio C. Wood* of Philadelphia.

Dr. Wood's experience and qualifications as an expert appear at fol. 877.

Having explained in detail the significance of the appearances noted on the exterior of Dwight's body, and the condition of his internal organs, as disclosed at the autopsy, at fol. 914, in answer to a hypothetical question, based on the facts in evidence, he testifies :

"IT IS NOT POSSIBLE THAT THE MAN COULD HAVE
"DIED OF ANYTHING ELSE THAN STRANGULATION
"BY A CORD."

4. *Dr. Benjamin F. Sherman* of Ogdensburg.

His experience and qualifications as an expert appear at fol. 965. He was present at the inquest in April, and details what he there observed. He took portions of the heart for microscopical examination, and found the heart perfectly healthy. He described the appearance of the indentation or furrow produced by suicidal hanging. At fol. 984, in answer to the hypothetical question as to the cause of death, he says, without qualification, that the immediate cause of death was "ASPHYXIA FROM
"HANGING."

5. *Dr. Elisha H. Bridges* of Ogdensburgh. His experience and qualifications as an expert appear

at fol. 1020. He was present at the inquest and details what he observed. In answer to the hypothetical question as to cause of death based on the facts in evidence Dr. Bridges, at fol. 1027, states his opinion as to the immediate cause of death, without any qualification, as follows :

“A. ASPHYXIA FROM HANGING.”

6. *Dr. George W. Avery* of Norwich, Coroner of Chenango County for nine years. He answers the hypothetical question at fol. 1062, that the immediate cause of death in his opinion upon the facts stated was “*Asphyxia*” produced “*by some instrument encircling his neck—a cord or rope.*”

Dr. Austin Flint, Jr., was called and explained on the stand “the mechanism of the congestion of “certain organs that would occur from asphyxia “produced by a constricting cord about the neck” (fol. 1081). Dr. Flint’s experience and qualifications as an expert appear at fol. 1077. The limit of six expert witnesses as to the cause of death fixed by the Court having been already exhausted, the defendant was not, under this ruling, permitted to take from Dr. Flint an answer to the hypothetical question put to the other witnesses.

The testimony of these witnesses also absolutely refutes the suggestion that Dwight had been suffering from congestive chills or any form of malarial fever. It must not be supposed, however, that any physician ventured to suggest on the stand that Dwight ever had any such disease, but on Dwight’s own declarations this notion was constantly ventilated in one form or another during the trial.

How did the plaintiffs attempt to meet this overwhelming testimony establishing the cause of Dwight’s death to have been *Asphyxia produced by strangulation by means of a cord*?

Although they called to the stand a number of

physicians who had been present at the autopsy, including Drs. Orton and Burr, Dwight's attending physicians, they did not venture to interrogate either of them as to his opinion on the cause of death.

No one of the plaintiffs' witnesses ventured to dispute the accuracy of the deductions drawn by the defendant's experts from the facts.

They contented themselves, so far as the cause of death was involved, with endeavoring to take from the force of their own declarations in writing made immediately after the autopsy in accord with the unanimous finding of all the fifteen physicians there present, as to the presence of "the heavy indentations" on both sides of the neck.

Some of them attempted to characterize these heavy indentations as "creases" or "folds in the skin and tissues below."

On their cross-examination, however, they were each and every of them confronted with the original notes and their own signatures, and obliged to admit that they, at the autopsy, assented to the accuracy of the notes and signed without protest or objection of any kind. Attention has heretofore been called to their testimony on this point.

They undertook, however, to advance a theory as to how these furrows or indentations were produced.

Some of them suggested that in their opinion these indentations or furrows were produced by the head having been raised or bent forward at an angle with the body while in the ice-box, and then, at the post-mortem examination, lowered to a level with the body, when the body was laid on its back on a board. No one, however, was able to give any reason for his opinion, based on former experience, observation or reading.

See, for instance, the testimony of Dr. Orton, in his cross-examination, at fols. 1834 to 1840.

It will be kept in mind that these indentations were observed when the head was thrown back ; that they existed on both sides of the neck, but were not observable immediately in front, over the cartilaginous substance constituting the "Adam's apple." Dr. Orton himself says, at fol. 1836, that this indentation, if produced by a cord or rope, would have been more marked upon the fleshy part of the neck than upon the cartilage.

Had it been a fold in the skin, produced by bending the head forward, that fold of course would have been more conspicuous while the head was forward, and more pronounced immediately in front than elsewhere.

This theory, however, was finally put at rest by testimony based on actual experiment.

Dr. Wood, fols. 1977, 1989, 1990.

Dr. Sherman, fols. 2003, 2007.

After the plaintiffs had closed their case, the defendant, in rebuttal, re-called the following medical experts, viz.:

Dr. Porter, fol. 1950.

Dr. Wood, fol. 1967.

Dr. Sherman, fol. 1995.

Dr. Swinburne, fol. 2009.

Dr. Bridges, fol. 2022.

Dr. Avery, fol. 2035.

A series of hypothetical questions, based upon the evidence as to the history of Dwight's alleged illness and the appearances presented by the surface of his body and his internal organs, at the autopsy and inquest, were put to these witnesses.

These questions will be found in the case, commencing at fol. 1950.

In answer to these questions, these witnesses unanimously agreed in the following conclusions :

1st. *That the person described in the question*

could not have died of congestive chill or any other form of malarial fever.

2d. *That death could not have been produced by natural causes.*

3d. *That the cause of death was mechanical asphyxia, produced by strangulation with a cord or some similar article.*

It will naturally be asked what question of fact was left, touching the cause of Walton Dwight's death.

That he died from no natural cause; that his death could only have been caused by asphyxia, resulting from strangulation by means of a cord or similar article, was established by the unanimous verdict of a body of experts of the largest experience and highest character, upon facts uncontradicted which admitted of no other conclusion.

The plaintiffs, unable to meet this issue, sought to avoid it and to get to the jury by putting on the stand the man who was left with Dwight on the fatal night after all the rest of the world had taken leave of him alive, for the last time.

They rested their case on the testimony of Charles A. Hull, the man who was there by appointment with Dwight, made two days before. The reason of Hull's selection for this purpose has been already pointed out. Dwight wanted Hull on that particular night because he thought Hull WOULD BE COOL IN CASE ANYTHING SHOULD HAPPEN (fol. 1265). The case was rested by the plaintiffs on Hull's declaration that he did not see any rope or cord about Dwight's neck or in his room that night (fol. 1249).

In view of this statement it became somewhat important to inquire into the credibility of this witness, and his cross-examination was addressed to that end.

This witness, on whose unsupported testimony the plaintiffs relied to overthrow the absolute demonstration made by the testimony of the experts, testified that he *could not say that he believed the Holy Scriptures to be anything more than the work of a mere man* (fol. 1258).

He could NOT say *that he believed in the existence of a personal God*.

He testified *that he had no fixed belief as to the existence of any overruling power that rewards and punishes, aside from those punishments inflicted in this world* (fol. 1261).

Spaulding, who was there holding the dead man's tongue, as appears from the evidence, was not called.

Mrs. Dwight, the plaintiff, who was the first to answer Hull's summons, was not called.

The plaintiffs contented themselves with swearing Hull, the atheist, who believes, according to his own testimony, in no personal God or overruling Providence, leaving the protruding tongue and the hands immersed in hot water unexplained, and on this testimony asked the Court and jury to find, in the face of the overwhelming mass of unimpeached testimony on the other side, that Walton Dwight died from some natural cause, which cause no one on the plaintiffs' side had the temerity to indicate.

It is true they did call the porter, James Lee, who brought the hot water after Spaulding and Mrs. Dwight and Mrs. Owen were there, and who was made to say that he thought he saw Dwight breathe, which was in conflict with all the other testimony. A curious, if not suspicious, circumstance in connection with the testimony of this witness, is, that Richards, the Coroner, testified that though he intended to subpœna and examine at the inquest all the witnesses who were present at the time of Dwight's death, this Lee was not subpœnaed as a witness, and that the Coroner was not

advised by any one from any quarter that James Lee knew anything about the matter.

In this condition of the proof on this issue the defendant's counsel on the trial requested the Court to instruct the jury, "that in weighing the testimony of a witness the jury are entitled to take into consideration, on the question of his credibility, his own declarations as to his belief or unbelief in the existence of a God and a future state of rewards and punishments."

Twenty-third request, fol. 2221.

The Court refused to give the instruction asked, but gave the jury the instruction on this topic, which appears in the case, commencing at folio 2156.

To this instruction, as well as to the refusal of the Court to charge as requested, the defendant duly excepted.

Exceptions, fols. 2183, 2199, 2222.

Immediately preceding the instruction of the Court upon the point last mentioned, the learned Court had expressed to the jury its views on the subject of the credibility of two of the defendant's leading expert witnesses in emphatic terms.

At fol. 2154 the learned Judge tells the jury, after referring to some portion of their testimony, that the jury have the right to regard the expert testimony of these two witnesses, *and that they should regard it* WITH GREAT SUSPICION (fol. 2154).

To this instruction the defendant duly excepted (fol. 2199).

This momentous question, then, between the atheist Hull, whose conscience was under no restraint from any belief in, or fear of God, or of any overruling Providence, or any future state of punishment, on the one side, and the whole body of expert witnesses, all men of high standing and character, on the other, was submitted to the

jury under instructions denying the right of the jury to take into consideration Hull's own declaration on the stand as to his belief or unbelief, in weighing his credibility, while in the same connection the jury were told that they had the *right to regard* and *should regard* the testimony of the leading experts WITH GREAT SUSPICION.

Notwithstanding the learned Court was so considerate as to tell the jury that the strictures which he had made on these two witnesses "must not affect the defendant's case in any other respect," the instructions complained of had a tendency to turn the scale against the defendant in a case where the jury were only able to come to an agreement after being kept together over fifty-one hours.

Various other exceptions were taken to the rulings of the Court pending the trial, and to the instructions given to the jury, to which attention will be called in due course.

Upon the close of the evidence a motion was made on the part of the defendant to dismiss the complaint.

The grounds on which this motion was made will be found at fol. 2042.

This motion was denied by the Court, and the defendant duly excepted (fol. 2048).

The defendant's counsel then requested the Court to instruct the jury to find a verdict for the defendant on each of the grounds, separately, on which the motion to dismiss the complaint was based.

The Court refused so to instruct the jury, and the defendant duly excepted separately to each refusal and ruling on each ground stated.

Several requests for special instructions to the jury were submitted by counsel for the defendant before the charge of the Court was delivered to the jury (fol. 2208).

These requests, with the disposition made thereof by the Court, will be found at fol. 2209, *et seq.*

At the conclusion of the charge certain other requests for instructions were presented to the Court.

These will be found at fols. 2168, 2170, 2173.

The counsel for the defendant in due season excepted separately to the refusal of the Court to charge in accordance with each of the several requests submitted, and separately to each and every modification by the Court of the propositions embraced in each and every of said requests, and separately to each and every portion of the charge actually delivered, so far as the same is in conflict with any or either of said requests (fol. 2222).

The counsel for the defendant also excepted to certain other portions of the charge actually delivered.

These exceptions appear at fols. 2182, 2183, 2184, 2185, 2186, 2196 and 2197 to 2201.

The jury were instructed by the Court to answer certain specific questions submitted to them, and also to find a general verdict.

These questions and the answers of the jury thereto appear in the case, commencing at fol. 2223.

The general verdict was for the plaintiffs for \$18,743.27.

POINTS.

I.

THE DENIAL BY THE COURT BELOW OF THE DEFENDANT'S MOTION FOR THE DISMISSAL OF THE COMPLAINT, MADE AT THE CLOSE OF THE EVIDENCE, WAS ERROR (fol. 2042).

The application for the policy in suit (Exhibit 21, fol. 2364) contains the following express agreement at the foot of the answers made by the applicant to the several questions contained therein, viz.:

"It is hereby declared that the above are fair and true
 " answers to the foregoing questions, and it is acknowledged
 " and agreed by the undersigned that the above statements
 " shall form the basis of the contract for insurance, and
 " also, that any untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to
 " pay the premium on or before the day it becomes due,
 " will render the policy null and void, and forfeit all payments made thereon."

* * * * *

By the policy in suit (Exhibit A, fol. 18):

"The Germania Life Insurance Company, in the City of
 " New York, in consideration of the representations made
 " to them in the application for this policy, and of the sum
 " of one hundred and thirty-one dollars and fifty-five
 " cents, to be paid on delivery of this policy by Walton
 " Dwight, and of the quarterly payment, upon the receipt
 " of the President or Secretary of the company of a like
 " amount, on or before noon of the twenty-eighth day of
 " November, February, May and August in every year during the continuance of this policy, do assure the life of

“Walton Dwight, of Windsor, in the County of Broome,
 “State of New York, in the amount of fifteen thousand
 “dollars for the term of his natural life.”

Later on occurs the following provision (fol. 19):

“This policy is issued and the same is accepted by the
 “said assured upon the following express conditions and
 “agreements; that the same shall cease and be null, void
 “and of no effect, and that this company shall not be
 “liable for the payment of the sum assured or any part
 “thereof, but that all premiums previously paid shall be
 “absolutely property of the company, without any ac-
 “count whatever to be rendered therefor, except as here-
 “inafter provided in the 4th condition of this policy.

“1st. If the representations made in the application for
 “this policy, upon the faith of which this contract is made,
 “shall be found in any respect untrue.”

It thus appears that these two papers each refer to the other as part of the contract; that the application contains the agreement of Walton Dwight that his answers therein given are TRUE; that his statements therein made *shall form the basis of the contract for insurance*, and that any *untrue* answer will render the policy null and void; while the policy on its part is declared to have been issued *in consideration of the representations made to the company in the application*, and contains the provision that it is issued and accepted upon the express condition and agreement (among others) that the same shall *cease and be null, void and of no effect*, and that the defendant shall not be liable for the payment of the sum assured, or any part thereof, *if the representations contained in the application, upon the faith of which the contract was made, should be found in any respect untrue.*

Upon these papers the Court correctly held, in

accordance with the well settled law of this State, as follows :

“ First. The policy in suit, with the application therefor, “ together constitute the contract of insurance between “ Walton Dwight and the defendant.

“ Second. By the contract of insurance between Walton “ Dwight and the defendant, the validity of the policy is “ made to depend upon the truth of the statements and representations contained in the application.

“ Third. By the contract of insurance involved in this “ action, the materiality of each and every answer made by “ Dwight to the questions contained in the application, “ was agreed to by the parties, and the sole question as to “ each of said answers is as to whether or not the answer “ is true.”

See the rulings of the Court on the first three of the “ requests to charge,” submitted by the defendant, fols. 2209, 2210.

May on Insurance, Sections 156 and 158, and cases cited.

Bliss on Life Insurance, Sections 34, 36, 37, 38, 39, 41, 42 and cases cited.

Ripley *vs.* Ætna Insurance Company, 30 N. Y., 136, 163.

Foot *vs.* Ætna Insurance Company, 61 N. Y., 571.

Baker *vs.* The Home Life Ins. Co., 64 N. Y., 648.

Barteau *vs.* The Phoenix Mut. L. I. Co. of Hartford, 67 N. Y., 595.

Graham *vs.* Firemen's Insurance Company, 87 N. Y., 69—at page 74.

This general rule, fully established in this State by the decisions of our own Court of Appeals, is

in harmony with the general rule of the other States of the Union, and with the English rule.

Anderson *vs.* Fitzgerald, 17 Jurist, 995.

Cazenove *vs.* Brit. Eq. Ass. Co., 5 Jurist (N. S.), 1309.

Same case on appeal, 6 Jurist, N. S., 826.

The later cases in this country, which were cited below, as modifying the rule, will be found on examination not open to that construction, but to contain features taking them out of the rule. Of this latter description is the case of *Burleigh vs. Gebhard Fire Insurance Company* (90 N. Y., 220).

In that case, the building in which the property insured was contained was briefly described in the policy as a "frame storehouse with slate roof, *standing detached at least 100 feet.*" While the Court held that this description was to be regarded as a warranty, and relating to the character of the risk, they also held that by reason of its brevity and vagueness it called for construction, and that properly construed, in view of the subject and context, it must be regarded as having been understood by the parties to refer to a building standing detached 100 feet from any other building of such character as to constitute an exposure and increase the risk. The Court say: "The brevity of the language requires that something be added to complete and elucidate the meaning" (p. 225). If the insurer intended that it should apply to any building, whatever its size or character, the Court further say, "He should at least say so by apt and appropriate language, and not ask the Courts to supply it by intendment." There is no intention on the part of the Court to depart from the settled rule in regard to the scope and effect of a warranty to be gathered from this case.

There is also a recent case of *Moulor vs. Am.*

Life Ins. Co., in the Supreme Court of the United States, in which the opinion was written by Mr. Justice Harlan, reported in the Supreme Court Reporter (Vol. 4, p. 466), which, at first glance, might appear to involve a departure from the rule as settled in this State. Upon examination, it will be found, however, that while the Court held that the application and policy in that case constituted the contract, and that both instruments might therefore be examined to ascertain whether the contract furnished a uniform and fixed rule of interpretation and what was the intention of the parties, they also held that in that particular case there was an apparent conflict, raising a doubt as to what was the intention of the parties, and calling for an interpretation by the Court, and upon the theory that in such case the construction must prevail which protected the insured against the obligations arising from a strict warranty, decided that the alleged warranties in that case must be regarded as representations only. This construction was reached from an examination of the entire contract which is not set forth at length in the opinion.

That case, however, holds that the use of the word "warranty" is not necessary to constitute a warranty in the law. In any view which may be taken of that case, however, it cannot be held to alter the law of this State, settled by the decisions of the highest judicial tribunal therein, or the rules of construction which have been established by such decisions. As a decision of a high judicial tribunal it is entitled to respectful consideration.

So far as the reasoning by which the conclusion reached ~~is sustained~~ ^{is} commends itself to the judgment of our own tribunals, and such conclusion is not in conflict with the decisions of our own Court of Appeals, weight will be given to it, but no further. In the absence of the text of the entire contract upon which the Court placed

its construction in that case, the result reached cannot be fairly criticised. It is enough to say, as has been already said, that the Court in the case cited does not profess to establish any new rule, but simply to construe a contract, the text of which is not furnished in full, and to gather a construction from all its parts, which would not seem to be sustained from the portions quoted in the opinion.

The rules applicable to these questions in our own State have been settled by the unanimous decisions of our highest Court, and are no longer open for discussion. In *Foot vs. Ætna Life Insurance Co.*, cited above, the Commission of Appeals, by Earl, C., say:

"Parties to insurance contracts have the right to make their own bargains as in other cases. An insurance policy is to be construed like other contracts, with a view to arrive at the intent of the parties. The rule that an insurance policy shall be construed most strongly against the insurer, can be resorted to only when, after using such helps as are proper to arrive at the intent of the parties, some of the language used, or some phrase inserted in the policy is of doubtful import, in which case the rule should be applied because the insurer wrote the policy" (p. 575).

Again (p. 576) :

"It matters not whether the representations are material or not. The parties have made them material by inserting them, and it matters not if the party insured made the untrue statements innocently, believing them to be true."

* * * * *

"The plaintiff in this action must stand by the answers of her husband as embraced in the contract, however innocently they may have been made. To render the policy void on account of the untrue answers, it was wholly unnecessary that the proposal or the policy should contain a clause expressly providing for a forfeiture on

“that account. The mere fact that the statements are warranties and untrue, vitiates the policy.”

In *Graham vs. Firemen's Insurance Company* (*supra*), in delivering the opinion of the Court, in which all the judges concurred, Mr. Justice Miller uses the following language :

“While it may well be that a misrepresentation of a matter which does not affect the risk, and is not material in some cases, as is claimed, will not avoid the policy, and whether it is material is a question for the jury, *such rule has, we think, no application where, by the terms of the policy, misrepresentations are converted into warranties by a stipulation that an untrue answer will avoid the policy*” (citing *May on Insurance*, 104, § 195). “If it is stipulated that if there is any misrepresentation whatever the contract should be void, it is of no importance whether it is a warranty or a misrepresentation. The materiality is contracted for, and under the rule as to warranties is not a subject of consideration.”

It will thus be seen, that under the rules established by the decisions of our Court of Appeals, effect is to be given to the contract of the parties in life insurance, as in other matters.

Where, by the terms of the contract, the application is declared to be the basis thereof, and it is provided that the contract shall be void, if the representations contained in the application shall be found in any respect untrue, the truth of each and every statement in the application is warranted.

Assuming that the word “representation” in such case was used in its technical sense, such representation is converted into a warranty, by the stipulation that the policy shall be void if the representation be found untrue.

The attention of the Court is now invited to certain questions contained in the application for

the policy in suit, and the answers of Walton Dwight thereto.

The application is set out at length at fol. 2364.

The second question in this application, the Court will observe, relates to the residence, place of business and kind of business in which the applicant is and has been engaged, and contains a note advising the applicant that his business must be *carefully specified*. The whole of this question, which is in four subdivisions, with the answers of the applicant thereto, is as follows :

" 2. A. For the party whose life is proposed to be assured, state the name at full length, *Walton Dwight*.

" Residence, *Windsor, County of Broome, State of N. Y.*

" Place of business, *Broome Co., N. Y., and Chicago*.

" Business carefully specified, *Real estate and grain dealer*.

" B. Is this business his own or does he work for other persons, and in what capacity? *His own*.

" C. In what occupation has he been engaged during the last ten years? *Real estate and grain dealer*.

" D. Is he now or has he been engaged in or connected with the manufacture or sale of any beer, wine or other intoxicating liquors? *No.*"

The next question to which the attention of the Court is invited is numbered "6," and with the answers thereto is as follows :

" 6. A. Whether the party to be assured is now or has been insured in this company. If so, state the number of the policy and the amount? A. *Yes; has paid-up policy for about \$800. Don't know No. of policy*.

" B. Whether in other companies, in which, and for what amount in each. State exactly on what kind of policy? B. *Yes; N. Y. Mutual, 15 year Endowment, 10,000; Conn. Mutual, Ordinary life, 15,000; Washington, Ordinary life, 10,000; Equitable, Ordinary life, 10,000.*"

" C. Whether an assurance has been applied for with this or any other company without having led to an assurance? " If so, with which companies? and for what reason did the application not lead to an assurance? C. *No.*"

The last question to which the attention of the Court is particularly called is numbered "16" and is as follows :

" 16. Has the party now or has the same ever had any
" of the following diseases :

" Spitting of blood.

" Bronchitis.

" Consumption.

" Liver Complaint.

" Rheumatism."

* * * * *

To this question Walton Dwight made the following answer :

" Last spring while in Chicago I was generally out of
" sorts ; had rheumatism and trouble with my stomach.
" Was sick some three weeks. Was prescribed for by Dr.
" Allen Brooks, of Chicago, some three or four times,
" when I was wholly recovered and have been well since.
" In 1869, I had something like dyspepsia, but nothing
" serious. No trouble since. To all these questions in No.
" 13 answers No, only as above."

It will be observed that "No. 13" in the foregoing answer was evidently inserted through inadvertence for "No. 16," the question the applicant was engaged in answering. By reference to question "No. 13" it will be seen that it called simply for names of physicians.

Turning now to the defendant's answer to the complaint in this action, it will be found that the second defense (fol. 39) counts upon the answers of Dwight to the several questions above set forth, and alleges the falsity of said answers, pointing out the respects in which they respectively were claimed to be untrue, and alleges,

" that by reason of said untrue and fraudulent answers
" to the said questions put to the said Dwight upon his ap-
" plication for the said policy, and his said false statements
" and suppressions and concealments of material facts, and

“breaches of warranty, the said policy number 69,096 was rendered null and void and of no effect and was forfeited, and these defendants were and are released and discharged from any and all liability thereon.”

It was contended on the trial that the falsity of each and every of the answers in question had been established by the uncontradicted evidence in the case, and the defendant's motion to dismiss the complaint was based on the evidence as establishing without contradiction the falsity of said answers respectively, and breaches of warranty in respect to each of said answers, which avoided the policy and precluded a recovery by the plaintiffs.

It is now proposed to consider the several grounds upon which the motion to dismiss was made (fol. 2042):

First.—The answer to subdivision “C” of question “2” was untrue, and such untrue answer amounted to a breach of warranty under the contract, which avoided the policy and precluded a recovery by the plaintiffs.

Second.—The answer to subdivision “D” of question “2” was untrue, and such untrue answer amounted to a breach of warranty under the contract, which avoided the policy and precluded a recovery by the plaintiffs.

For purposes of convenience, these two points will be considered together, as they both have reference to the same general subject, viz., the business or occupation in which Dwight had been engaged, and the evidence, to some extent, is the same on both branches.

It will hardly be contended that the occupation in which an applicant for life insurance has been engaged is not an eminently proper subject of investigation by a company to whom such applica-

tion is addressed. Some occupations *per se* have a direct tendency to shorten life. Others, from temptations they hold out, greatly increase the moral hazard, while others again tend to the formation of habits which impair the prospects of the person engaged therein reaching the limit of what would otherwise be his expectancy of life.

Under the law of this State, however, as already shown, when the parties, by the terms of their contract, as in the case at bar, deliberately agree that the validity of the policy shall be dependent upon the truth of the statements or representations contained in the application, and that the policy shall be null and void if the representations made in the application for the policy, upon the faith of which the contract is made, shall be found in any respect untrue, no question arises as to the materiality of the answers. The parties, by the terms of their contract, have made them material. The only question to be considered in such a case is the truth of the answers.

In what occupation then had Walton Dwight been engaged during the ten years preceding August 22, 1878, the date of his application to the defendant? Was the answer "Real estate and grain dealer," given by him to that question, true?

Had Walton Dwight ever been *engaged in or connected with* the manufacture or sale of any beer, wine, or other intoxicating liquors?

Let us examine the evidence on this subject.

Walton Dwight, in his sworn examination in his bankruptcy proceedings, signed and verified February 19th, 1878, six months and three days before he signed the application for the policy in suit, testified as follows (fol. 401):

"Q. I understand you made your settlement on your wife, about when? A. It was done in the latter part of June or July, 1868.

“Q. From that time down to the time of the commencement of the Dwight House business, had you any business of your own? A. I had not; not further than my lawsuits, general living, and the like of that; I had no business of my own.”

Again at fol. 396 :

“I think I opened the Dwight House in May, 1874, or rather I furnished part of it then and ran it partly as a hotel, and rented part of it. In the spring of 1875 we furnished the balance of it, and ran it for about three years as a hotel.”

By reference to the case it will be seen from the context that the report of the examination is manifestly incorrect and that it should be as above.

“The only business I had was the Dwight House business and livery. The other business was my wife’s business, although I had always kept it as my own account, and run it without being particular to keep any account of the Dwight House or my business. When I opened the Dwight House, I intended it for a summer resort; it was kept open the year around, but I relied more upon the summer custom; the park was used in connection with the Dwight House and cottages, in fact the whole city had the use of it. I kept no open bar; liquors were sold in packages; I should think I had some two or three thousand dollars worth of stock when I opened the house; the stock was larger then than at any time afterward; that included cigars; I took out of my private house some six or seven hundred dollars worth of liquors that were not invoiced; I kept wines, liquors and cigars all through my business. These were bought at different places. I cannot state the amount of business, per annum; the books will show; it was somewhere in the neighborhood of \$25,000 or \$30,000 a year; that is, the first year. Then it keeps running down. I used every dollar of the money received from this sale of the Pennsylvania land.”

“At page 43 :

“Q. Did you have an account of the wines and liquors?
“A. Yes, sir.

"Q. When does it commence? A. It commences June 1, 1874, on page 80, and continues to July 31, 1875.

"Q. Was that a part of the Dwight House business? A. Yes, sir.

"Q. Does the ledger account show the condition of this after this date? A. It does not."

The next witness on the subject of Dwight's connection with the sale of liquors was,

Owen J. Coughlin, Clerk of the Board of Excise of Binghamton.

Mr. Coughlin's testimony will be found at fol. 387. He there testifies as follows :

"I am the Clerk of the Board of Excise of Binghamton ;
 "I have the records of the board here ; on May 14, 1875,
 "a State hotel license was granted to Walton Dwight on
 "Mr. Dwight's own application ; on the 20th of May, 1876,
 "he was again granted a tavern or innkeeper's license to
 "sell liquors and ales ; on May 14, 1874, he was granted a
 "hotel keeper's license on his own application ; it was the
 "ordinary hotel or innkeeper's license."

Benjamin Devoe, Deputy Collector of Internal Revenue, at fol. 388, testified as follows :

"I reside at Binghamton ; my office is that of Deputy
 "Collector of Internal Revenue ; I was Revenue Collector
 "of the United States in 1874, 1875 and 1876.

"Q. Do you know whether licenses were granted through
 "your office, under the laws of the United States, to Wal-
 "ton Dwight, in those years, or either of them, for the sale
 "of liquors? A. They are not licenses.

"Q. Whether the revenue tax was paid by Mr. Dwight
 "for the sale of liquors at the Dwight House? A. Yes,
 "sir.

By the Court :

"Q. During what years, do you say? A. 1874, 1875
 "and 1876.

By Mr. Larocque :

"Q. He paid a special tax for selling wines, liquors and
 "and cigars at the Dwight House? A. Yes, sir ; he did.

" Q. Did you visit the Dwight House from time to time during those years? A. I was there occasionally.

" Q. Mr. Dwight was the proprietor of that house? A. I so understood it.

" Q. What was the fact as to there being wines and liquors for sale at the Dwight House during those times?

" A. I couldn't tell you, sir; I have no knowledge on that subject."

John H. Armstrong, porter in Dwight's employ during the three years in which he kept that hotel, at fol. 391, testified as follows:

" I reside in Binghamton at present; I am at present head waiter at the Hotel Bennett; I was employed at the Dwight House by the late Colonel Walton Dwight from May 1st, 1874, until March 6th or 10th, 1877, I think it was; I was with him so long as the hotel was open; I had charge of the omnibus running to the depot —porter.

" Q. Was there a wine-room kept in the Dwight House at that time? A. There was.

" Q. Were wines and liquors sold there in bottles? A. Yes, sir.

" Q. Were they furnished guests upon call? A. Yes, sir.

" Q. (Bottle handed witness.) Look at the bottle I now show you, and tell me whether that was the description of bottles kept in that wine room that were used there, and is that one of such bottles? A. Yes, sir."

" The bottle referred to bore upon its face a shield with the words 'Dwight House, Binghamton,' stamped upon it; it was made an exhibit in the cause, and marked number 16.

" Q. These bottles were made for the Dwight House at that time in various sizes? A. Yes, sir.

" Q. Half pints, pints, quarts and so on? A. Yes; quarts, I believe, was the highest.

" Q. And was that business of selling wines and liquors put up in packages of that kind conducted at the Dwight House during the whole time of your connection with it?

" A. Yes, sir.

"Cross examined by Mr. Newton :

"Q. This wine cellar was the only place where there were any bottles of wine kept that you know of, wasn't it?"

"A. Yes, sir, that's all. There was no bar in that house ; no persons came there to drink at the bar or anything of that kind.

"Q. These bottles of wine, I suppose, were placed upon the dining-table when called for, weren't they? A. Yes, sir.

"Q. And only to guests of the house? A. Yes, guests of the house.

"Re-direct-examination by Mr. Larocque :

"Q. Do you mean to say that nobody could buy a bottle of wine or liquor in that wine-room except a guest of the hotel? A. I never saw any sold there.

"Q. Your business was going back and forth with the omnibus? A. Yes, sir.

"Q. Weren't they sent to the rooms of guests in the hotel? A. Yes, sir ; if they wished.

"Q. You didn't scrutinize who drank them? A. No, sir ; I didn't."

The evidence above set forth embraces every word of testimony in the case on the subject of Dwight's having been engaged in or connected with the sale of liquor.

That Walton Dwight kept a hotel from about May 1, 1874, to about March 8, 1877 ; that in connection with the hotel business he kept a wine-room, where he carried on the business of selling liquors by the package ; that he had bottles of various sizes made expressly for the purposes of this liquor business, stamped with the name of his hotel ; that he regularly in each of said three years applied for and took out the ordinary tavern-keeper's license ; that in each of said three years he paid to the proper officer of the United States the special tax imposed by the laws of the United States on the sales of liquors so made by him, no one has ventured to question.

On this point there was no pretence of a conflict.

That the answer given by Dwight to the question as to whether he had been engaged in or connected with the manufacture or sale of any beer, wine or other intoxicating liquors was untrue, was thus established without a shadow of conflict or controversy.

There was no ambiguity about the question. The printed note in the application opposite the question as to his "business," warned the applicant that his business must be carefully stated. The subdivision of the question which interrogated him, as to his connection with any traffic in spirituous liquors, was clear, distinct and exhaustive.

He was required to say not only whether he had been *engaged in*, but also whether he had been *connected with the manufacture or sale* of any beer, wine, or other intoxicating liquors. No opportunity was allowed for mental reservation. His attention was clearly and distinctly called to the point, whether he had had anything to do directly or indirectly, as a business or an incident to a business, with either the manufacture or sale of intoxicating liquor. He deliberately answered this question in the negative, without any qualification whatever.

No question of fact was raised by the evidence on this point. The testimony of all the witnesses, including that of Walton Dwight himself, was in perfect harmony.

In delivering his charge to the jury, the learned Judge who tried the cause at Circuit used the following language (fol. 2076):

"It is not disputed that during the period that Mr. Dwight kept the Dwight House, that he sold liquors, and in this manner, he sold wines and liquors in bottles to the guests of his house, furnished it to the guests at their rooms or at the table. The evidence is, that he sold in no other way and in no other manner. It appears from Dwight's evidence before the Commissioner in Bank-

“ruptcy, that when he went into the Dwight House he had
 “a stock of wines, liquors and cigars, amounting to from
 “twenty-six hundred to three thousand dollars in value.
 “The extent of the subsequent purchases is not disclosed
 “by the evidence. It appears also that he was licensed
 “during this period by the United States and by the
 “Excise Board of the City of Binghamton, to make sales in
 “this way and in this manner. But it is not claimed that he
 “was ever in any other way or manner engaged in the sale
 “of liquors.”

The duty, therefore, devolved upon the Court to decide, as matter of law, whether, upon the uncontradicted evidence on this subject, there had been a breach of warranty which discharged the defendant. Only one decision was possible under the rule of law, which had received the express approval of the learned Judge himself who presided at the trial. The answer was untrue. By the terms of the contract the policy was to “cease, and be null, void, and of no effect,” and the defendant was “not to be liable for the payment of the sum assured or any part thereof,” if the representations made in the application, upon the faith of which the contract was made, should “be found, *in any respect, untrue.*”

The truth of this statement, answer or representation, by whatever name called, had therefore been warranted by the applicant. The uncontradicted evidence in the case established the falsity of this answer. There was therefore, as matter of law, a breach of warranty, which avoided the policy, and precluded a recovery by the plaintiffs. It was the plain duty of the Court to so declare, and to grant the motion made by the defendant for a dismissal of the complaint on that ground.

The question submitted involved only the construction of a written contract. It is the peculiar province of a Court to construe written instruments

and to declare their legal effect, and the submission of such questions to a jury is error.

Glacius *vs.* Black, 67 N. Y., 563.

St. Luke's Home, &c. *vs.* Association for Indigent Females, 52 N. Y., 191.

Arctic Fire Ins. Co. *vs.* Austin, 69 N. Y., 470, at p. 477.

Nash *vs.* Drisco, 51 Maine, 417.

Roth *vs.* Miller, 15 Serg. & R., 100.

Shepherd *vs.* White, 11 Texas, 346.

Drew *vs.* Towle, 30 N. H., 531.

Thomas' Executor *vs.* Thomas, 15 Ben. Monroe's R. (Ky.), 178.

Perth Amboy Mf. Co. *vs.* Condit, 21 N. J. L., 659.

Brown's Adm'rs *vs.* Hatton, 9 Ired. R. (N. C.), 319.

Williams *vs.* Waters, 36 Georgia, 454.

The Supreme Court of the United States, by Marshall, *C. J.*, in *Levy vs. Gadsby* (3 Cranch, 180), use the following forcible language on this subject, viz. :

"No principle is more clearly settled than that the construction of a written evidence is exclusively with the Court."

The Supreme Court of Pennsylvania, by Tilghman, *C. J.*, in *Welsh, Admr. vs. Duser* (3 Binn., 337), emphasize the importance of this rule in the following terms, viz. :

"The construction of written instruments is the province of the Court; and it is of the utmost importance that this province should not be invaded by the jury."

And again, in *Denison's Executors vs. Wertz* (7 Serg. & R., 373, at p. 376), the same Court, by Tilghman, *C. J.*, declares :

“It is the right of every suitor to have the opinion of the Court on such matters as by the law of the land the Court is bound to decide; and one of these matters is the construction of written contracts.”

Even the terms of an oral contract, when clearly proved and intelligent and explicit, are to be construed by the Court and not by the jury.

Short *vs.* Woodward, 13 Gray, 86.

Rhodes *vs.* Chesson, Bush (N. C.) L., 336.

Smalley *vs.* Hendrickson, 29 N. J., L., 371.

The refusal of the Court to non-suit on this state of facts, to which refusal the defendant duly excepted, was, it is respectfully submitted, an error, for which the judgment should be reversed, without regard to any other question in the case.

Turning again to the answer, “Real Estate and Grain Dealer,” given to subdivision “C” of question “2” in the application, it will be found that this also was an untrue answer.

The question called for the occupation in which the applicant had been engaged during the last ten years.

We have already shown from Dwight’s own sworn testimony in the bankruptcy proceedings that in June or July, 1868, more than ten years prior to the date of the application under consideration, he settled his property upon his wife. This settlement included the real estate known as Dwightville, and substantially all the property he had (fol. 416). From that time till May, 1874, when he went into business as a hotel-keeper, he swore that he had no business of his own (fol. 401). He carried on the business of keeping a hotel, and

in connection therewith selling liquor by the package, from May, 1874, to March, 1877. Again (fol. 400) he says: "I say, the Dwight House was the "only business I had as a regular business."

In April, 1877, was filed his petition in bankruptcy (fol. 419). On August 2, 1877, he verified his petition for discharge (fol. 448). In December, 1877, his examination was commenced before the Commissioner, and continued from time to time to February 19th, 1878, when he signed and swore to his deposition (fol. 418), and also signed a petition for leave to amend his schedules, which, he says, he has been enabled to perfect, and which he filed March 8, 1878 (fol. 431). Then followed the preparation for the submission of the application for discharge, the briefs on which, as has been shown, were only filed on July 30, 1878, and on the following day the inauguration of his life insurance project, the history of which, in detail, has been given in the statement hereto prefixed. From Binghamton, when the work of making applications had been completed, he went to Windsor, remaining there hunting, fishing, swimming streams, and drinking surface water until about the middle of October, when he went to Binghamton to die.

The whole period of the ten years preceding the date of the application was fully covered by the testimony to which the attention of the Court has been called.

When during that period was Walton Dwight engaged in the occupation of a "real estate and grain dealer?"

Certainly not prior to April, 1877, when his petition in bankruptcy was filed, for he himself swore most positively that he had been engaged in no regular business till he opened the Dwight House, and that after that his sole business was keeping the hotel, in connection with which he sold liquor by the package, and livery.

The only suggestion in the record that he had

ever had a transaction in grain occurs in the testimony of Levi C. Phillips, who narrates a conversation he had with Dwight in a railroad car, on the subject of Dwight's taking out a policy on his life. In that conversation Dwight told Phillips an amusing story of a speculation in which he pretended to have been engaged in Chicago, which will be found at fol. 542. Of course this constituted no evidence of the fact that he had ever had such a transaction. Certainly no one would pretend that it tended to prove that his occupation had, during the ten years preceding the date of his application, been that of a grain dealer.

Neither can any evidence be found in the case tending to show that the answer was true so far as he stated his occupation to have been that of a real estate dealer.

On this branch of the question the plaintiffs relied in opposing the motion for a non-suit, first, on the evidence of T. F. McDonald, Dwight's brother-in-law, as to the character of the improvements which had been put on the real estate at "Dwightville," which had been settled by Dwight on his wife in 1868, and the means for improving which were derived from moneys obtained by Mrs. Dwight on mortgage, and secondly, on the bankrupt schedules which formed part of the record of Dwight's bankruptcy proceedings, put in evidence to establish the fact of his bankruptcy.

Neither of these, however (assuming what is expressly denied, that the bankrupt schedules were competent evidence for such purpose), tended to prove that Dwight's occupation during the period in question had been that of a real estate dealer. While we have on the other hand his express declaration under oath as to what his only business had been during this period, to wit: Keeping a hotel, in connection with which he sold liquors by the package, and livery.

The question called for an answer as to the

regular business, or occupation in which he had been engaged during the period, not for a particular speculation or venture. The note on the application warned him that his business must be "*carefully specified.*" The answer he gave was manifestly and beyond contradiction untrue, and being untrue, by the terms of the contract, itself avoided the policy and precluded a recovery by the plaintiffs.

Third.—Upon the uncontradicted evidence in the case, the answer of Walton Dwight to subdivision "B," of question "6," contained in the application for the policy in suit, to the effect that he was insured in the New York Mutual (meaning the Mutual Life Insurance Company of New York), on a fifteen year endowment policy for \$10,000, and also to the effect that he was insured in the Connecticut Mutual Life Insurance Company, on an ordinary life policy for \$15,000, was, so far as the said answer related to each of the companies named, untrue; and such untrue answer constituted a breach of warranty, which avoided the policy and precluded a recovery by the plaintiffs.

Application, fol. 2364.

1st. As to the alleged insurance in the Mutual Life Insurance Company of New York.

The first witness called on that subject, was

Isaac F. Lloyd, Secretary of the Mutual Life Insurance Company of New York. This witness produced from the records of the company an application by Walton Dwight to his company, dated July 31, 1878, for \$25,000 on the plain life plan (fol. 197). The application was not approved for \$25,000. He testifies that the company executed a policy dated August 19, 1878, for \$10,000, on the fifteen year payment plan, and delivered it to their

general agent, Fayette P. Brown. The application identified by the witness was the only application pending with that company in the summer of 1878, and there was no other policy on the life of Walton Dwight, which had ever been signed by the officers of the company, in existence at that time. The general agent was subsequently ordered to return the policy, and it was accordingly returned and cancelled. No premium was received on that policy.

Fayette P. Brown, the general agent of the Mutual Life Insurance Company, testified that in the year 1878, one D. C. Vosbury, since deceased, had been his agent at Binghamton, in the business of the Mutual Life Insurance Company. He identifies the application of Dwight (Exhibit 1, fol. 2308), as having been received by him August 8, 1878, from Vosbury. It was originally for \$25,000 on the plain life plan—Brown finally received from the company a policy for \$10,000 on the fifteen year plan—the company being willing to accept the risk only for \$10,000, on the fifteen year plan—took the policy to Yonkers, August 18th, and sent it to Vosbury the same day. He received a letter dated August 27, 1878, directing him to return this policy (Exhibit 3, fol. 2319), and on the same day telegraphed Vosbury, requesting him to return the policy, and in compliance with that request, received back the policy from Vosbury, accompanied by a letter dated 27th August, 1878 (Exhibit 4, fol. 2320). No premium had been received on this policy.

During the period in which the witness had been general agent of this company there had been no transaction between Dwight and the company in respect to any insurance other than what took place on this application (fol. 231). This witness identifies the policy register kept by Vosbury, an

extract from which was read in evidence and marked Exhibit "5" (fol. 2321).

The only other witness who testified with regard to this alleged insurance was *Neri Pine*, the attorney for Mr. and Mrs. Dwight in their bankruptcy proceedings, who also took part in raising the money to pay the first quarter's premiums on the life policies secured, and who acted as the legal adviser for Dwight in examining the policies and the applications therefor. On his direct-examination he testifies (fol. 1418) that Vosbury, the sub-agent, brought him the policy, saying that Dwight directed him to take it to the witness and leave it with him, and call there and get his money for the premium. The witness told him to leave it till the Colonel came around. Pine says he subsequently returned this policy to Vosbury, he thinks on August 27th; Vosbury came to the witness and said he wanted the policy. The witness suggested that Vosbury "should leave it until the Colonel returned and see what arrangement could be made about it; he said No, he wanted it then."

This policy was then returned to Vosbury by Pine.

On his cross-examination this witness struggled very hard not to admit that the policy was received by him for examination as Dwight's legal adviser, but was at last driven to that admission (fol. 1442).

It was some days before he found time to examine this policy. When he did examine it Dwight found fault with it. The ground of his objection was "*that it was not such a policy as he understood it was to be, and he didn't want that kind of a policy*" (fol. 1458). The precise difficulty was that the premiums were payable in fifteen years, and the policy not payable until his death.

It will be remembered that the application was for \$25,000 on the ordinary life plan, and the company would only grant a policy for \$10,000 on the

15 year plan. This policy Dwight refused to accept. Two or three days after this the policy was returned to Vosbury as already stated and by him returned to Brown, the general agent, who sent it to the office of the company where it was cancelled. No premium was ever paid on this policy (fol. 1460). The reason for Pine's delay in examining the policy is given at fol. 1417. He says he was engaged making up petitions in bankruptcy for various parties which had to be filed on or before August 30th. There was no controversy or conflict about the facts of this transaction with the Mutual Life Insurance Company of New York. The testimony was all in perfect harmony. Dwight applied for a policy for \$25,000 on the ordinary life plan. The company declined to issue a policy for that amount or on that plan, but was willing at first to insure him in \$10,000 on the 15 year plan, and made out such a policy and handed it to its general agent. This policy was sent to Vosbury at Binghamton, who by Dwight's direction left it with Dwight's legal adviser for examination, who was to pay the premium if the policy was approved. As soon as the lawyer found time to examine the policy, objection was made by Dwight that it was not in accordance with his application. Meanwhile the company for some reason saw fit to recall the policy. It was returned to them in accordance with their demand.

It was never delivered or accepted, and no premium was ever paid.

The question then recurs whether, upon these facts, Dwight was insured in the Mutual Life Insurance Company of New York for \$10,000, on the 22d day of August, 1878, when he signed the application to the defendant.

If he was not, then the answer now under consideration was untrue and there was a breach of warranty in that respect which avoided the policy.

Whether he was or was not insured upon the un-

disputed facts in evidence was a question of law for the Court.

The Court will also remember in this connection that this policy was returned to the agent before the defendant's policy was issued. The defendant's policy was only dated August 28, and it could not have been issued till after that date, as the application to increase the amount to \$15,000 was only made in Herman's letter of August 28 (Exhibit 111, fol. 2677).

Even if it were possible, therefore, to find upon the facts in evidence that the answer under consideration was true at the time the application was signed, the statements therein must be regarded as continuing statements repeated down to the time of the company's action, and no one could pretend that this statement was true or that Dwight did not know it to be untrue at the time when the defendant acted upon it and Dwight received the policy issued on the faith thereof.

2dly. As to the alleged insurance in the Connecticut Mutual Life Insurance Company.

The first witness who testified on this subject was

Joseph Hillman. This witness was one of the firm of Peck & Hillman, the general agents of the Connecticut Mutual for the State of New York, excepting only Long Island and New York City, since 1862. The residence of the witness was Troy. He identifies an application by Walton Dwight to the Connecticut Mutual for insurance on his life to the amount of \$25,000 on the life plan (Exhibit 6, fol. 2322).

This application bears date 31 July, 1878, and was received by the witness from Lowell Harding, the local agent at Binghamton, August 1, 1878 (fol. 242).

Not a true copy of the original. The original is in the possession of the Connecticut Mutual Life Insurance Company.

*This on Life Ins. Sec 95.
May on Ins. Sec 190
+ cases cited.*

The witness forwarded the application to the company at Hartford. The company required a further medical examination which was furnished. A policy for \$15,000 only was received from the company and forwarded to Harding about August 17th or 18th, with receipt for an annual premium.

Policy, Exhibit 8, fol. 2326.

There was considerable correspondence back and forth. Dwight wrote a letter to Harding under date of August 12, 1878, stating that he had a paid-up policy in the "Equitable" for \$40,000, which letter was attached to the application (see copy opposite fol. 2327). The receipt which came with the policy was for an annual premium.

This was returned to the company under date of August 19, and a new receipt for a semi-annual premium forwarded in its place (fol. 270, Exhibit 13, fol. 2336). This was enclosed to Harding by Peck & Hillman with letter of 21st August (Exhibit 1, fol. 2273).

Then the company, by telegram of 2d September, ordered the witness to retain the policy, and the witness, on the same day, telegraphed Harding to hold the policy (Exhibit 12, fol. 2335).

Next, the witness sent a special agent to Binghamton to make an investigation—one Lorenzo Barber—since deceased. Barber made his report to the company at Hartford (fol. 254).

The Medical Examiner having considered the additional information furnished, declined to accept the risk on Dwight's life. This decision was communicated to Hillman by letter, dated September 12, 1878 (Exhibit 10, fol. 2332). Under date of September 19, 1878, the company, upon further consideration, reaffirmed its decision to decline Dwight's application, and so advised Peck & Hillman by letter of that date (Exhibit 11, fol. 2334).

The policy thereupon came back to Peck & Hillman, with the premium receipt, about September 25, 1878, and was returned to the home office (fol. 258). No premium was received on this policy (fol. 259).

Lowell Harding, local agent at Binghamton, identifies the application as received from Dwight July 31, 1878 (fol. 274). He sent it to Peck & Hillman. Further medical examination was called for, and the witness obtained and forwarded certificate of Orton. Then more information with respect to some statement in regard to spitting of blood was required. On August 22, 1878, witness received the policy and premium receipt. He showed them to Dwight, who said, "Such a day 'you go to Mr. Pine, and he will pay you the 'premium on the policy,'" naming the day (fol. 277). On the day designated—some eight days after the receipt of the policy—Harding went to Pine's office, but Pine was absent.

The next day he went again, taking the policy. Pine looked it over, then looked at a letter attached, and said, "That is a part of the application, and 'is considered as such,'" and told the witness he could not pay the premium till that was changed, referring to the statement in the letter of August 12 that Dwight was insured in the Equitable in a paid-up policy for \$40,000. The policy was then left with Pine for examination (fol. 279).

This occurred about August 28th or 31st (fol. 280). The witness had received the policy back from Pine before the receipt of the telegram of September 2d (Exhibit 12), and had it in his possession at that time. It remained in his possession until he returned it to Peck & Hillman about September 24th. He never received any premium on that policy (fol. 282).

The only evidence introduced by the plaintiffs on

this subject, as in the case of the alleged insurance in the Mutual Life Insurance Company of New York, was the testimony of Dwight's attorney, Neri Pine.

He says, on his examination-in-chief, that Harding left the policy with him—he thinks very soon after the policy bears date, and that it remained with him for a week or two weeks—"quite a time" (fol. 1416). He was very busy at the time, making petitions in bankruptcy, which had to be filed by August 30th.

On his cross-examination, as has already been pointed out, this witness was obliged to admit that he acted as Mr. Dwight's legal adviser in examining his applications for insurance and policies issued thereon for the purpose of ascertaining their sufficiency (fol. 1442). That in his capacity of legal adviser he found fault with the sufficiency of the Connecticut Mutual policy, and application attached to and forming part thereof, the first time he had an opportunity to examine them, and communicated his objections to both Dwight and Harding, the agent (fol. 1444). He admits that his memory is not clear or distinct.

He had some conversation with Harding on this subject, and subsequently returned the policy to Harding. He could not say that any changes suggested by him had been made when the papers were returned to Harding. No premium was ever paid on that policy to his knowledge.

This witness merely confirms the testimony of the defendant's witnesses, though he admits his memory is not clear or distinct as to dates.

Upon the uncontradicted testimony of all the witnesses, then, the history of this transaction was briefly as follows :

Dwight applied for a policy on his life for

\$25,000. The company were unwilling to accept him for that amount, but executed a policy for \$15,000, and sent it to their general agents, who in turn sent it to Harding, the local agent. Harding was referred by Dwight to Pine, his legal adviser, who was engaged in examining on his behalf such policies as he succeeded in getting, and who would pay the premium if the papers should be found in order. Harding accordingly left the policy with Pine for examination. Pine examined it at the first opportunity, found fault with it on the ground of a mis-statement in a letter of Dwight forming part of the application which was attached to the policy, called the attention of Harding and Dwight to the defect, and returned the policy to Harding. The company then directed the agent to hold the policy till receipt of further instructions. Some further correspondence was had and examination made, and finally the company declined the risk and ordered the return of the policy, and it was returned accordingly. This policy was *never delivered and no premium was ever paid thereon.*

The question again recurs, whether upon these undisputed facts Walton Dwight was insured in the Connecticut Mutual Life Insurance Company for \$15,000 on the 22d day of August, 1878, when he signed his application to the defendant.

If he was not, then the answer now under review was untrue, and there was a breach of warranty in that respect which avoided the policy. Whether he was or not insured upon the undisputed facts in evidence was a question of law for the Court.

Without contradiction, therefore, it was established by the evidence that the answer to question "6" in the application to the defendant, so far as it stated an existing insurance in either the Mutual Life Insurance Company of New York, or the Connecticut Mutual Insurance Company, was untrue, and as by the express terms of the contract with

the defendant, the policy should cease and be null and void and of no effect, and the defendant should not be liable for the payment of the sum assured or any part thereof, if the representations made in the application upon the faith of which the contract was made should be found *in any respect* untrue, the defendant's motion for the dismissal of the complaint should have been granted, and the denial of said motion under the defendant's exception was error for which the judgment should be reversed.

Fourth.—Upon the uncontradicted evidence in the case, the answer of Walton Dwight to subdivision "C" of question "6," in his application to the defendant was untrue, and such untrue answer constituted a breach of warranty which avoided the policy.

The precise question now to be considered is in these words, viz. :

"C. Whether an assurance has been applied for with this "or any other company without having led to an assurance? "If so, with which companies? and for what reason did the "application not lead to an assurance?"

The evidence established without contradiction, that at the date of the application to the defendant applications had been made by Dwight to several companies which had not led to an assurance, and many of which never did lead to an assurance.

The question was not whether Dwight had made any application for insurance on his life which *had been rejected*, but whether he had made any application which had not, at the date of the application to the defendant, led to an assurance. It called for pending, undecided applications as well as rejections.

1. He had made an application to the Mutual

Life Insurance Company of New York, under date of July 31, 1878, which had not led, and never did lead to, an assurance. This company had declined his application both as to amount asked for—\$25,000—and as to plan—plain life. It had been willing to give him a policy for not to exceed \$10,000, but only on the plan of all premiums being paid in fifteen years. To this form of policy Dwight objected, and the policy was returned by his lawyer, to whom it had been submitted for examination to the company, and cancelled. It had actually been ordered back and returned prior to the date of the defendant's policy.

Exhibits 3 and 4, fol. 2319.

2. Dwight had made an application to the Connecticut Mutual Life Insurance Company, under date of July 31, 1878, for \$25,000, which had not led, and never did lead, to an assurance.

This company also had declined his application for \$25,000, and the proposed policy for \$15,000 was never accepted or approved, and as has been already shown, was recalled and cancelled before delivery or payment of premium.

3. Dwight had made an application to the Phoenix Mutual Life Insurance Company, under date of August 15th, 1878, for \$10,000, which had not led, and never did lead, to an assurance. It was finally declined *in toto* August 24, 1878, four days prior to the date of the policy in suit.

Cornwall, fol. 1932.

There was no room for any pretence of misunderstanding or good faith in this instance. Nothing had occurred to justify any assumption on Dwight's part that this application would be favorably entertained when the formal application to the defendant was signed and forwarded; and four days before his broker at his instance wrote to the de-

fendant, proposing to increase the amount of insurance for which he had applied to it, the application to the Phoenix had been peremptorily declined. It will be remembered that this same broker, Hermanns, was acting as an assistant to Brown, the agent of the Phoenix (Exhibit 111, fol. 2677). Not only then was the answer to the question under consideration untrue in fact at the time the application was signed, but even assuming that the question could be tortured into an interrogation as to actual rejections, the answer, in that sense, was absolutely untrue, when, on August 28th, it was renewed for an increased amount. Good faith then called upon Dwight to declare the fact, even if he had been mistaken in his construction of the question when he signed his application to the defendant, and supposed, as was argued by counsel, that the question called only for actual rejections.

The language of the question, however, is utterly inconsistent with any such construction. It called for the specification of any application made by him which had not led to an assurance—for a specification of every pending application.

4. Dwight also had made an application to the John Hancock Life Insurance Company for insurance on his life to the amount of \$10,000, under date of August 21, 1878, which had not led, and never did lead, to an assurance (Exhibit 17, fol. 2344).

5. Dwight had also made an application to the Penn Mutual Life Insurance Company for insurance on his life to the amount of \$10,000, under date of August 20, 1878, which had not led, and never did lead, to an assurance (fol. 516; Exhibit 18, fol. 2352).

6. Dwight had also made an application to the Globe Mutual Life Insurance Company for insur-

ance on his life to the amount of \$15,000, under date of August 20, 1878, which had not led, and never did lead, to an assurance (fol. 516; Exhibit 20, fol. 2361).

It is submitted in conclusion upon this question, that the answer under consideration was and is untrue in both letter and spirit.

If the parties had not by their express agreement made this answer material, by providing that the contract should be void and of no effect if the representations contained in the application, on the faith of which the policy was issued, should be found in any respect untrue, even then this statement would have been from the nature of the case material.

Suppose, by way of illustration, that Dwight had answered that he had made an application to the Mutual Life Insurance Company of New York for \$25,000 on the ordinary life plan, and that that company had declined to grant a policy for that amount, or for the period of life, but was willing to grant a policy for, not to exceed, \$10,000 on the fifteen year plan only, the acceptance of which policy was under consideration. Would not that answer have immediately invited investigation as to the facts within the knowledge of that company which had led to this action?

Suppose that Dwight had answered that he had applied to the Connecticut Mutual for \$25,000, which they had declined to grant, but had offered a policy for \$15,000 only, the acceptance of which offer was under consideration; would not that answer have led to inquiry? Inquiry in that direction would have led to the fact that Dwight had admitted to the Connecticut Mutual that he had had spitting of blood, *but as he said only from the teeth*. As his mother had admittedly died of consumption, the mere suggestion that he had had spitting of blood from any source would

have necessarily led to close investigation of all the facts, and the result of such further investigation would have been, as it was in the case of the Connecticut Mutual Company, the rejection of the application *in toto* by the defendant.

Suppose he had said that he had an application pending with the Phoenix Mutual Life Insurance Company unacted on, the result would necessarily have been a conference between the officers of the two companies with the same result in each case—the rejection of his application.

Or suppose, finally, that when, after the rejection of his application, which it will be kept in mind occurred August 24th, 1878, Dwight applied, as he did, through Hermans August 28th, 1878, to increase the amount of insurance mentioned in his original application, he had corrected his answer by saying that since the date of his application the Phoenix Mutual Company had finally rejected his application to that company; would not that information have put the defendant on its guard, and led to a further investigation which would necessarily have resulted in the rejection of the application?

Did not good faith require this disclosure at his hands if, as was claimed by counsel, he had fallen into any error as to the purport of the question when he originally signed the application?

In *Traill vs. Baring* (4 De Gex J. & S. R., 329), Lord Justice Turner states the following rule of law:

“I take it to be quite clear that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of

“conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances, and that this Court will not hold the party to whom the representation has been made bound, unless such a communication has been made.”

This rule, it is respectfully submitted, applies with great force to the application rejected by the Phoenix Life Insurance Company hereinbefore mentioned. That application was pending undisposed of at the time the application was originally presented to the défendant. It had been formally rejected on the 24th August, four days prior to Dwight's request, made through Hermans to the defendant, to increase the amount stated in his original application to the defendant upon the footing of that application. He then knew that the Phoenix application had been rejected, and without correcting his answer permitted the defendant, in ignorance of the fact, relying upon the warranties in the application, which the law construes as being continued down to the time when the defendant acted thereupon, to issue its policy on the faith of such statements and warranties.

But the question called for applications to other companies *which had not then led to an assurance*; not for rejections only. The answer was untrue as to each of the companies above specified. If it was untrue as to either, it was a breach of warranty which avoided the policy, and the Court below erred in refusing to non-suit on that ground.

Fifth.—Upon the uncontradicted evidence in the case, the answer of Walton Dwight to question “16,” contained in the application, on the faith of which the policy in suit was based, was untrue; and such untrue answer constituted a breach of warranty which avoided the policy.

Question "16" reads as follows :

"16. Has the party now or has the same ever had any of the following diseases :

" Spitting of blood.

" Bronchitis.

" Consumption.

" Liver complaint.

" Rheumatism."

* * * * *

To this question Dwight answered as follows :

" Last spring, while in Chicago, I was generally out of sorts. Had rheumatism and trouble with my stomach ; was sick some three weeks. Was prescribed for by Dr. Allen Brooks of Chicago, some three or four times, when I was wholly recovered, and have been well since. In 1869, I had something like dyspepsia, but nothing serious ; no trouble since. To all these questions in No. 13, answers, *No, only as above.*"

The attention of the Court has already been called to the clerical error in the above answer, where "No. 13" is manifestly inserted by mistake for "No. 16," the number of the question under answer.

The complaint (fol. 13) alleges,

" that the representations contained in the application for said policy were in all respects true ; and that said policy was valid and in full force and effect at the time of the death of the said Walton Dwight."

The defendant, by its answer (fol. 34),

" upon information and belief, *deny* that the representations contained in the application for said policy were in all respects true, and they particularly deny that the representations contained in the application for said policy *touching the previous* condition of health of the said Dwight, and especially in regard to his ever having had spitting of blood or bronchitis," * * * * " or any or either of them, were or are true."

Again, by way of second defence, the defendant alleges this answer, among other answers to questions contained in the application, to have been false and untrue, and to have constituted a breach of warranty whereby the policy was rendered null, void and of no effect (fols. 39-48).

An order having been obtained requiring defendant to specify in a bill of particulars the precise times and places when and where Dwight had had bronchitis or spitting of blood, under pain of having any proof on that subject excluded on the trial, a bill of particulars was served specifying Williamsport in the State of Pennsylvania, and the period between December 1, 1866, and May 1, 1867, as one of the places and times where and when the defendant expected to prove that Dwight had had bronchitis accompanied by spitting of blood (fols. 90-91).

An order was made August 6, 1883, for the issue of a commission for the examination of witnesses at Williamsport, on the part of the defendant, named in the order. This order limited the time for the defendant to examine witnesses to August 18th, 1878, while free scope was given to the plaintiffs to examine whom they would upon six days' notice to defendant (Order, fol. 1898).

Several witnesses were examined on the part of the defendant under the commission issued pursuant to this order, but the plaintiffs did not examine a single witness thereunder.

The evidence in support of this defence was of three kinds—

1st. The testimony of residents of Williamsport who were eye-witnesses to the fact of Dwight's spitting of blood at Williamsport in March, 1867.

2ndly. The testimony of several highly respectable and unimpeached witnesses to Dwight's declara-

tions that he had had serious hemorrhages of the lungs ; and,

3rdly. The testimony of physicians present at the autopsy held fifty-two hours after his death as to the existence in one of his lungs of several small fibrous nodules, which, according to the notes of the autopsy signed by all the fifteen physicians present, were probably the result of *old pulmonary phthisis*, and which, according to the expert testimony, would fully account for the spitting of blood at Williamsport.

The attention of the Court is now invited to this testimony :

Robert M. Forsman, lumber merchant, a resident of Williamsport for thirty years and upward, testifies that he was residing at the Herdic House in that city in the winter of 1866 and 1867, while Dwight and his family were also residing in the same hotel. He had made Dwight's acquaintance in 1865, subsequent to which date the witness had business relations with him (fol. 288). They were together quite frequently, visiting each other in their rooms. Dwight was ill at the Herdic House in March, 1867. The time is fixed upon the witness' mind by the fact that Dwight was obliged to go to Canada about that time in connection with the purchase of a tract of timber land in Canada for a company called the Williamsport and Canada Lumber Company, in which they were both interested (fols. 290-303). Mr. Forsman was present in Dwight's room frequently during this illness. He was called in to see him by Mrs. Dwight, one of the plaintiffs (fol. 293). Dwight was then under the care of Dr. W. C. Doane. He was confined to his room coughing severely, and had hemorrhages. Witness was present when Dwight spat blood after severe coughing spells (fols. 290, 291). On one oc-

casion this witness when in Dwight's room saw him spit blood as he says *quite liberally*. He estimates the amount at about *half a pint of red blood*. Dwight himself called his attention to it in a vessel beside his bed (fol. 294). Mrs. DWIGHT was then present (fol. 296). Dwight stated to this witness "that he regretted having these severe coughs, and "it would carry him off some day, he thought * * "that he had had hemorrhages" (fol. 293).

Peter Herdic, a resident of Williamsport for about thirty years, the owner of the Herdic House, knew Dwight before the latter came to Williamsport. Dwight was there boarding at the Herdic House with his wife, in the winter of 1866-7 (fol. 321).

This witness also had business with Dwight during that season in connection with the "Canada lumber land," and was in the habit of seeing him every day or so. Dwight was ill at the Herdic House in March, 1867; was confined to his room most of the time for a period of from ten days to two weeks to the best of the witness' recollection (fol. 322). Dwight came back from Canada, was sick in his room, and coughed a good deal (fol. 323).

He had to return to Canada by the first of April, to pay a sum of money, or lose the sale of these Canada lands. The transaction was an option, and a certain sum had to be paid by the first of April, or he would lose the money already paid. It was a matter of interest to the witness, that Dwight should be able to go before the first of April. Dr. W. C. Doane attended Dwight, and the parties interested desired to have the Doctor go with Dwight. They thought it was not safe for Dwight to go alone. This witness saw Dwight spit blood at this period, both in the street and in his room. He describes it thus:

"The blood looked like fresh blood; it was red.

" I think rather light, bright color ; bright, fresh blood, I should think " (fol. 326).

Dwight said he " had hemorrhages, I understood of the lungs, and he thought it would carry him off some time " (fol. 326).

On cross-examination (fol. 340) this witness testified that he saw Dwight spit blood in his room in March, 1867. He says :

" I think he had been spitting in a bowl while in bed, and the bowl was all bloody."

The witness saw him spit on this occasion. Being interrogated as to the quantity, he says (fol. 341) :

" At this time I didn't see a great deal ; there wasn't any great quantity, probably two or three teaspoonfuls of spit : I don't think I saw that but once in his room ; it looked like fresh blood."

Charles Bartles, junior, an attorney of Williamsport, testifies to an interview between Dwight, the father of the witness, and the witness himself, in March or April, 1867, at the Herdic House. Dwight was endeavoring to make a sale to Mr. Bartles, senior, of some of his Canada lumber stock. Dwight then assigned as a reason for his desiring to dispose of a portion of his stock, that "*he had had a lung difficulty and a hemorrhage*, and he had more stock than he could carry without borrowing money, and he wasn't in a condition to borrow it" (fol. 348).

Horace E. Taylor, of Williamsport, examined under the open commission, testified that he was living at the Herdic House during the years 1865, 1866 and 1867. He made Dwight's acquaintance there in 1865 or 1866. Dwight and his wife were living in the same hotel during part of this period. The witness and his wife were frequently in the

rooms of Mr. and Mrs. Dwight. In answer to the question as to whether Dwight was ill and confined to his bed or rooms during this period, this witness says :

“ I think he was ill for a few days ; I don't remember how long a time. The character of his illness, I understood, was hemorrhage of the lungs. I can only recollect that he had a hard cough ; he coughed as I do when I have a severe cold on my lungs ” (fol. 359).

Later on, the witness testifies :

“ I think he mentioned to me, while he was recovering, and before he was entirely well, on two or three occasions, *that he had had a severe attack of hemorrhage of the lungs* ” (fol. 360).

Again, being interrogated as to whether Dwight, when he made the statements testified to, expressed any fears as to the result of these attacks, the witness says : “ I don't remember particularly ; I only remember of his saying he had a pretty *“ close call,*” or something of that kind ” (fol. 360).

Again this witness says :

“ When Walton Dwight was ill in this hotel he looked as though he had had a fit of sickness and was very pale ; ” * * * “ my recollection is that *he had a very severe cough for some time.* I could not give any definite time. My recollection is that it was for several weeks ” (fols. 361, 362).

This witness was also interested with Dwight in the Canada lumber matter, in connection with which Dwight's presence in Canada on April 1, 1867, was necessary.

He says he thinks he saw Dwight as often as daily during that illness (fol. 363).

Anna C. Spackman, widow of the Rev. Henry S. Spackman, formerly Chaplain of the Episcopal Hospital in Philadelphia, was living at the Herdic House in Williamsport with her husband during

part of the year 1866, and the years 1867 and 1868. She there made the acquaintance of Mrs. Dwight, the plaintiff, and of Walton Dwight, her husband. Walton Dwight was out of health during that time. Upon being interrogated as to her knowledge of the ailment from which Dwight was suffering, derived from her own observation, or from Dwight's declarations to her, this witness testified as follows :

" From observation, I saw, after coughing, mucus raised streaked with blood ; he said he was spitting blood after a severe cold ; to the best of my recollection his sickness was of short duration ; he said in the presence of my husband and myself, once, in my room, that some years previous in Michigan, he had raised blood ; he said nothing as to the quantity " (fol. 373).

Two other witnesses were examined on the part of the defendant under the commission to Williamsport, viz. : Mrs. Eucie Herdic and Mrs. Maria Hoppes. The recollection of neither was very distinct, though corroborative of the other witnesses so far as it went. The defendant, therefore, did not read their depositions on the trial, but they were offered and read on the part of the plaintiffs at the close of their rebutting testimony. Mrs. Herdic's deposition appears at folio 1909.

Although she says she never knew of Dwight's being ill, she says (fol. 1912) :

" I have heard Col. Dwight speak of having a hemorrhage in a general way, that is, not to me particularly."

Again, at fol. 1917 :

" I could not give the language, neither can I give the time nor place ; but I remember of hearing him speak in a general way of having had a hemorrhage."

Mrs. Herdic also testifies (fol. 1913) :

" The only remark that I ever remember to have been made by Col. Dwight was in relation to his cough, at one

“time, when he said in the presence of several people that
 “*he expected some time his cough would take him off.*”

Mrs. Hoppes' recollection is limited to the fact of Dwight's having a cough, and that Dr. Doane attended him. She says that by the word “sickness” as used in her testimony, she understands “confined to his bed.”

Edward R. Seccomb, of West Newton, Massachusetts, a retired merchant, sixty-seven years of age, testified that he was at Binghamton, New York, on the evening of March 28, 1876, and the following day. He stayed at the Dwight House, and there made the acquaintance of Dwight. He had never been in Binghamton before, and had never before seen or heard of Dwight. He is enabled to fix the date by his memorandum book, in which was recorded the date of his visit to Binghamton (fols. 167-173). In the course of an hour's conversation between Dwight and this witness in the hotel office on the evening of March 28, 1876, Dwight informed Mr. Seccomb “*that he had had a severe hemorrhage of the lungs*” (fol. 169).

Mr. Seccomb was subjected to a searching and protracted cross-examination, the result of which was to show the circumstances under which Dwight had made this statement, and the reason why it had been indelibly fixed on the mind of the witness.

It appears from this testimony that Mr. Seccomb had good reason for the interest he took in all cases of hemorrhages of the lungs. He states these reasons briefly in his re-direct examination (fol. 193), as follows :

“I had a severe attack myself for weeks, and was not able
 “to move from the bed or speak ; and after I recovered
 “from it I never got over the sensation, and I have not to
 “this day ; and then my son was taken at the same time

“or age in life that I was, and of course it has been in the family, and he is a young man comparatively, and I am sensitive upon that subject; and I don’t think I have ever met a person that had had hemorrhage of the lungs that I did not question upon that subject in order to know the details of it; I did it for my own gratification; it is thirty-five years ago, and I have never got over the sensation I had at that time.”

Again, at folio 185, he says:

“I wanted to see if his symptoms were similar to mine.”
 * * * * “This subject of symptoms has been on my mind for thirty-five years.”

He details to the counsel for the plaintiffs the subjects of his conversation with Dwight, and at folio 190 continues:

“He then said to me, ‘Well, I have had hemorrhage of the lungs,’ and I asked him where he thought it came from, whether from the lungs or from the breaking of a blood-vessel, or from his stomach, and he told me it came from his lungs; that he had had a pretty serious trouble with them, and that was the drift of the conversation.”

Dr. John Swinburne, of Albany, was present at the autopsy held November 18, 1878, the third morning after Dwight’s death, in the presence of fifteen doctors. This autopsy was held, it will be remembered, at the instance of Dwight’s own physicians, who invited whom they would. Dr. Delafield conducted the autopsy, and Dr. D. S. Burr acted as secretary, recording in the notes, under Dr. Delafield’s direction, the appearance of the body and its several organs, as the autopsy proceeded. Dr. Swinburne (fol. 777) testifies as follows:

“In the upper lobe of the right lung was found what was unquestionably a cicatrix, perhaps three-fourths of an inch in diameter; by “cicatrix” I mean scar; underneath and in the upper portion of the lung was what I term

“ ‘nodules’; I see they have been very emphatically called
 “ here ‘lumps’; they were nodules, as you will often find,
 “ as the result of old standing tubercular lungs; the left
 “ lung was tied down somewhat by old adhesions.”

By reference to the *fac simile* of the notes of this autopsy, as recorded by Dr. Burr, and signed by the fifteen physicians present, which will be found at the end of the “Appendix,” the Court will observe that Dr. Burr first made the following record, viz.:

“ Upper lobe (right lung) at the apex several small
 “ fibrous cicatrices, probably the result of old pulmonary
 “ phthisis.”

Afterwards the pen was drawn through “cicatrices” and “nodules” was written above.

How this alteration came to be made does not clearly appear.

In the hurry of recording, however, and the confusion incident to the discussion going on, what was intended to be written down, was exactly what Dr. Swinburne observed, viz., the prominent “cicatrix” testified to by Dr. Swinburne, and “several small fibrous nodules.”

Having omitted the word “cicatrix” first, and having it in his mind, he wrote it after “fibrous,” and then, on looking at it again, remembered “nodules” to have been used, and inserted that word in the proper place, striking out “cicatrix,” and failing to reinsert the latter word in its proper place. The record in this latter form, “*Upper lobe (right lung) at the apex several small fibrous nodules, probably the result of old pulmonary Phthisis,*” having been read over in the hearing of the fifteen physicians present, was signed by each and every of them without objection or protest, as their deliberate conclusion from the investigation in which they had participated.

Notes of Autopsy, p. 6, Appendix.

Dr. Horatio C. Wood, of Philadelphia, who occupies the first rank in this country among medical experts and scientists, was interrogated as to the origin and significance of the "mucus streaked with blood," the blood spitting, and the presence of the fibrous nodules in evidence. His testimony on this subject begins at fol. 890, and is as follows :

" Q. Where does mucus come from in the body that in coughing is streaked with blood? A. Usually it comes from the lungs; it may come from the throat.

" Q. What does the existence of nodules in the lungs indicate? A. Various things; they may indicate cancer of the lungs; hard, fibrous nodules indicate previous ulceration and destruction of the tissue of the lungs; they are usually of the same character as cicatrices or scars on the external surface of the body; it is a scar in the lungs, and indicates a past destruction of the tissue.

" Q. Do lacerations of the lungs generally produce hemorrhage or spitting of blood? A. Yes; the blood vessels of the lungs are excessively numerous, occupying in all parts of its tissue, and being many of them very small and placed very close to one another.

" Q. What are the symptoms of bronchitis which would be noticed by a person who had not any medical knowledge? A. Coughing and spitting or expectorations; beyond this depends how closely a person observes; bronchitis is an inflammation of the lining of the membrane of the bronchial tube. * * *

" Q. What are the appearances of the blood from the lungs? A. Bright red, more or less frothy.

" Q. Can blood of such bright character come from the finger? A. Yes; that depends upon whether the artery is cut.

" Q. Now, assuming that the person has had a cold with very frequent cough, spitting of mucus streaked with blood, spitting of considerable quantities of blood, years afterwards hard nodules of a scar-like or cicatricial character are found in the apex or upper part of the lungs on the *post mortem* examination, is there any, and if any,

“ what presumptive connection between the nodules and
 “ the previous cough, in your opinion ?

“ Objected to on the ground that it is not
 “ competent to submit to a scientific gentleman,
 “ because it is not a matter of science, what the
 “ presumptive connections are ; the Court sus-
 “ tained the objection, to which ruling the coun-
 “ sel for defendant duly excepted.

“ Q. Assuming the facts as I have indicated in my pre-
 “ vious question, in your opinion, is there any connection ?

“ A. Yes.

“ Q. What is the connection between the two ? A. As I
 “ have already stated, the fibrous nodule in the lungs is al-
 “ most invariably the cicatrix of an old ulceration ; ulcera-
 “ tion of the lung is a common cause of hemorrhage of the
 “ lungs, and having, therefore, a history of the presence of
 “ the common cause of hemorrhage from the lungs, and a
 “ history of the presence of the hemorrhage, the presump-
 “ tion is that the cause is—my opinion is—that the effect
 “ has followed from the cause and the ulceration been pro-
 “ ductive of hemorrhage.”

Dr. Austin Flint, Junior, testified as follows
 (fol. 1098) :

“ Q. What do small fibrous nodules or cicatrices in the
 “ apex of one of the lungs indicate ? A. They indicate
 “ previous tuberculous disease ; or I might say old tuber-
 “ culous disease.

“ Q. In case there has been a spitting of blood from
 “ tubercular disease, or hemorrhage of the lungs, and the
 “ wound is healed and years elapse, is it possible to detect
 “ it by auscultation or percussion of the lungs ? A. In a
 “ great majority of cases, no ; unless the tuberculous
 “ disease has been quite extensive, it would not be possi-
 “ ble.”

Again (fol. 1139), “ a man who spat blood from the lungs
 “ would be likely to know that it came from the lungs.”

Dr. Dwight M. Lee, of Oxford, agrees with
 Doctors Wood and Flint in their opinions, as to
 the connection between the nodules found in

Dwight's lungs and the hemorrhages in evidence, and the impossibility of discovering the presence of these nodules by an examination of the chest during life (fols. 1141, 1142).

Dr. George W. Avery, of Norwich, testifies to the same effect (fol. 1057):

This proof establishes conclusively,

1st. That Walton Dwight in March, 1867, was confined to his room at the Hérdic House in Williamsport, for from one to two weeks.

2d. That the nature of his illness was a hard cough accompanied by spitting of blood on various occasions, in quantities running from about three teaspoonfuls, seen by one witness, to in the neighborhood of half a pint, seen by another witness; in the presence of witnesses who testified to the facts, and that he also during the same illness raised mucus streaked with blood.

3d. That Mrs. Dwight, the plaintiff, was with her husband during this illness, and herself invited one of the witnesses (Forsman) into her husband's room to see him.

4th. That Dwight, both during this illness and afterwards, declared to several witnesses not only that he had had hemorrhages of the lungs, but that he feared that this trouble would *carry him off some time*.

5th. That these were not the first hemorrhages he had had, but that prior to that sickness, when in Michigan, he had had such hemorrhages.

6th. That there were found in the apex of Dwight's right lung on the autopsy, according to the testimony of his own physicians, several small fibrous nodules, which, with the unanimous consent

of all the physicians present, were recorded as probably the result of old pulmonary phthisis; all the fifteen physicians present signing the record without objection on the part of any one.

7th. That such fibrous nodules are the result of old ulcerations; that ulceration of the lungs is a common cause of hemorrhage of the lungs; and that the presence of these nodules would sufficiently account for the hemorrhages in evidence, which Dwight himself had declared over and over again to have proceeded from his lungs.

8th. That after the lapse of years it would be impossible to detect the presence of such fibrous nodules by a physical examination of the chest during life.

The plaintiffs wholly failed to contradict this evidence in any particular.

Although they had been notified by the defendant's bill of particulars, that defendant expected to prove spitting of blood by Dwight at Williamsport at the time testified to by the witnesses; although they had the further notice by the application for the commission and the examination of witnesses thereunder, that proof of this fact would be offered and relied on, and although they had secured by the terms of the order and commission abundant opportunity to examine whom they would under the commission, they neither examined a witness under the commission nor called a witness from Williamsport to contradict, on the stand, the testimony of defendant's witnesses. They did not even venture to put on the stand Mrs. Dwight, who invited the witness, Forsman, into Dwight's room at the time when he was lying in bed, spitting blood, as testified by that witness. Neither did they venture to call Dr. W. C. Doane, who, according to the testimony of all the Williamsport wit-

nesses, attended Dwight during his illness at that place, and could tell better than any other human being what was then the matter with Dwight, and the source of the hemorrhages in evidence; who was also in Court, but whose lips were sealed by the statute, unless the plaintiffs, standing in the place of the patient, saw fit to open them.

They called, however, a man by the name of Henry T. Reynolds, from Brookland, Pennsylvania, who testified to his acquaintance with Dwight; who also swore that he was in Williamsport in March, 1867, for ten or twelve days, and saw Dwight frequently during that period at the Herdic House and elsewhere (fol. 1489); that Dwight was then suffering from a bad cold, but he observed nothing else at that time about his health (fol. 1491), and that he never saw him spit blood (fol. 1493).

On cross-examination he fixes the period of this visit to Williamsport in March, 1867, somewhere from the 10th to the 20th (fol. 1496). His hotel was the City Hotel, and he registered his name the day he got there (fol. 1498).

The defendant disposed of this testimony by calling the porter of the City Hotel, *Clemens Deutschler*, who produced on the stand the hotel register of the City Hotel, covering the year 1867, and which showed that Mr. Reynolds was not at the City Hotel in Williamsport in either February, March or April, 1867 (fol. 1927).

The plaintiffs also called other persons who had known Dwight at different periods and in different places, who testified, under defendant's objection, that they had not seen him spit blood. No one of these witnesses, however, professed to have been in Williamsport during the three years that Dwight and his wife were living there, and no one of them professed to have seen him in Michigan, where Dwight had previously had hemorrhages of the lungs, as he stated to the witness, Mrs. Spackman (fol. 373.)

Neither was there any contradiction or attempt at impeachment by any one of either of the witnesses who had testified to Dwight's repeated declarations that he had had hemorrhages of the lungs, which he expected would carry him off some day.

The only other testimony offered by the plaintiffs having the slightest relevancy to the question now under consideration was that of two physicians present at the autopsy, Drs. Hyde and Chittenden. The object of this examination was to make light of the fibrous nodules found in the apex of Dwight's right lung, which the fifteen physicians present, including these witnesses, had certified to be there, and to be probably the result of old pulmonary phthisis.

Dr. Hyde, in his examination-in-chief, refers to these nodules at folio 1578. On his cross-examination (fol. 1594) he testified as follows :

"Q. Were there notes kept of this autopsy? A. There were.

"Q. By whom? A. By Dr. Dan. Burr; he did the writing. I made no suggestion as to what should go in those notes.

"Q. Did you make any dissent as to what should go in those notes? A. No.

"Q. Did you hear the notes read over after they were finished? A. Yes.

"Q. Did you express your satisfaction with them? A. I did.

"Q. And that satisfaction remains now, does it? A. Yes.

"Q. So that there is nothing that is contained in those notes of that autopsy to which you then dissented or now dissent? A. No, not that I heard read there."

Dr. Chittenden, in his examination-in-chief, refers to these nodules at folio 1745.

On his cross-examination he admits (fol. 1754) that these fibrous nodules might indicate previous pulmonary phthisis.

He also admits (fol. 1753) that he signed the

notes of the autopsy, by which the fifteen physicians present certified that these fibrous nodules were probably the result of old pulmonary phthisis.

He also admits (fol. 1758) that the notes were read to him before he signed, and he heard the whole and made no objection, and also (fol. 1760) that he made no such examination of the substance of these nodules as would enable him to say that it did not extend below the surface of the lung. He also (fol. 1768) admits the existence of the old adhesions in the lungs, and at folio 1771 says that they indicate that the disease of pleurisy has existed.

Having thus called the attention of the Court to all the evidence having the slightest bearing upon this question, it is most respectfully submitted that there is no conflict whatever.

The facts established by the defendant's evidence, to which attention has heretofore been called, remain undisturbed, unassailed.

Walton Dwight is proved, without contradiction, to have had spitting of blood, accompanied by a severe cough, during an illness at Williamsport, March, 1867, in which he was attended by Dr. Doane, his medical advisor. He declared over and over again that he had had hemorrhages of the lungs, not only during this illness, but at some time prior thereto, in Michigan. His lungs on the autopsy contained fibrous nodules, which all the physicians present, including his own attendants, certified over their signatures to be probably the result of old pulmonary phthisis. The medical experts show that ulceration of the lungs produces nodules of this description, and that hemorrhages of the lungs are the result of ulceration of the lungs, and that these nodules indicate previous ulceration of the lungs, which would account for the hemorrhages in evidence.

No one ventures to hazard the assertion that

these nodules were not produced from change of structure resulting from ulceration or abscess of the lungs, which caused the hemorrhages in evidence.

The question then recurs, was the answer "No," given by Walton Dwight to the question in the application, as to whether he had ever had spitting of blood, among other diseases, true or untrue?

But one answer, it is respectfully submitted, could be given to this question. Its utter untruthfulness was established beyond contradiction and without conflict by the testimony of the eye-witnesses to the fact of his spitting blood, by his own declarations as to the origin of his blood-spitting, to wit, "that he had hemorrhages of the lungs," confirmed by the appearance of his lungs after death, as certified by all the physicians present at the autopsy, including all who testified as to such appearances on the trial.

Not only had he had spitting of blood, but such spitting of blood was the result and evidence of disease of the lungs as he himself knew and declared. He had had not only one but several attacks of this description. Prior to the attack at Williamsport he had had a like attack in Michigan. These attacks had been of so serious a character as to impress upon his mind the conviction that they would ultimately terminate fatally, and this conviction he stated over and over again to different witnesses and at different times. Not only, therefore, was this spitting of blood the result and evidence of disease of the lungs, as testified by the medical witnesses, but known to Dwight so to be when he signed the application. The case was, therefore, brought within the letter and spirit of *Cushman vs. The U. S. Life Ins. Co.* (70 N. Y., 72). These attacks evidenced a vice in the constitution of which he was fully cognizant, and the answer was, therefore, not only untrue as matter of fact upon the uncontradicted evidence in the case,

but known to the applicant so to be at the time he signed the application.

Great reliance was placed by the plaintiffs' counsel on the trial upon the case of Grattan against the Metropolitan Life Insurance Company (92 N. Y., 274). An examination of that case, however, will show that it has no bearing. The answer, which was the subject of consideration in that case, had reference to the health of another person. The Court distinguished between an answer with reference to the health of a person himself and one with reference to the health of another person, and in the opinion say :

“ A warranty in an application for a policy of life insurance that a third person is in good health, does not mean an actual freedom from illness or disease, but simply that the person has indicated in his actions and appearance no symptoms or traces of disease, and to the ordinary observation of a friend or relative is in truth well.”

It will be observed that this language has no reference to a warranty of a person's own freedom from disease ; *a fortiori* to an answer given by a person as to his own health which he knew to be untrue where the symptoms and traces of disease had been observed by himself according to his own declarations to numerous parties. It will be observed that in the case at bar there was absolutely no conflict. Not only so, but the plaintiff, Mrs. Dwight, who was proved to have been present during one of these attacks, and who was present in Court at the trial, was not called, and did not venture to suggest any question as to the accuracy of the testimony of the witnesses for the defendant in any particular. There was nothing, therefore, to submit to the jury upon this point, and the refusal to nonsuit on this ground was error, for which, under the defendant's exception, the judgment must be reversed.

On each and every of the grounds, therefore, on

which the motion for non-suit was based, the defendant was entitled to a decision in its favor upon the well settled rule of law. There was nothing to sustain a finding of the jury in favor of the plaintiffs on either of said points, and the duty of the Court in such case was to grant the motion.

Deyo *vs.* N. Y. Cent. R. R.,
34 N. Y., 9, and cases cited.

This rule is very happily expressed by the Supreme Court of the United States in the case of the Improvement Company *vs.* Munson (14 Wallace, 442). The Court there say :

“Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case, the Judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge; not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.”

Again, as has been repeatedly said by our own Court of Appeals :

“The power to nonsuit results from the principle that the Court is the judge of the law when there is no dispute about facts.”

Pratt *vs.* Hull, 13 John., 334.

Labar *vs.* Koplin, 4 N. Y., 547.

The People *vs.* Cook, 8 N. Y., 67 (at p. 75.)

Millbank *vs.* Dennistoun, 21 N. Y.,
386.

It was therefore plainly the duty of the Court below to have granted the nonsuit. As to some of the grounds, there was no question whatsoever as to the facts, as admitted by the Court, and the question submitted called for the performance by the jury of a function which the law has devolved upon the Court.

Lomer v Meeker 25 N.Y. 361.

II.

THE DEFENDANT WAS ENTITLED TO THE INSTRUCTION TO THE JURY TO FIND A VERDICT IN ITS FAVOR ON EACH OF THE GROUNDS ON WHICH THE MOTION TO DISMISS THE COMPLAINT WAS BASED. THE REFUSAL OF THE COURT SO TO INSTRUCT THE JURY WAS ERROR, AND THE EXCEPTION TO SUCH REFUSAL ON EACH OF THE GROUNDS STATED WAS WELL TAKEN (fol. 2049).

Herring vs. Hoppock, 15 N. Y., 409,
and cases cited under Point I.

As was said by Mr. Justice Cowen in delivering the opinion of the Court in *Rich vs. Rich* (16 Wend., at p. 676):

"Where there is a conclusion of law arising on plain facts, the Judge may, *and it is indeed his plain duty*, to direct a verdict according to such conclusion."

III.

THE VERDICT OF THE JURY AND EACH AND EVERY FINDING OF THE JURY UPON THE QUESTIONS SUBMITTED TO THEM WAS CONTRARY TO THE EVIDENCE, AND ON THAT GROUND SHOULD BE SET ASIDE, AND THE MOTION MADE BY THE DEFENDANT'S COUNSEL AT THE CLOSE OF THE EVIDENCE, TO SET ASIDE THE SAID VERDICT, SHOULD HAVE BEEN GRANTED, AND THE ORDER DENYING THE MOTION MADE UPON THE JUDGE'S MINUTES PRESENTED FOR REVIEW UPON THESE APPEALS SHOULD BE REVERSED, AND A NEW TRIAL ORDERED. (See Order, fol. 128.)

1st. The answer given by the jury in the affirmative to the first question submitted to them, to wit:

"Was the occupation of Walton Dwight for ten years preceding August 22, 1878, real estate and grain dealer, within the meaning of the contract?"

was not only unsupported by any evidence in the case, but contrary to the whole evidence on that subject.

2d. The answer given by the jury in the negative to the second question submitted to them, namely:

"Was Walton Dwight engaged in the sale of beer, wine, or other intoxicating liquors, at any time within five years prior to August 22, 1878, within the intent and meaning of the contract?"

was not only wholly unsupported by a particle of evidence, but was contrary to the unanimous testimony of the witnesses exam-

ined on the subject, including the sworn deposition of Walton Dwight himself.

3rd. The answer of the jury in the negative to the third question submitted to them, to wit :

“ Was Walton Dwight connected with the sale
“ of any beer, wine, or any other intoxicating
“ liquors, at any time within five years prior to
“ August 22d, 1878, within the intent and mean-
“ ing of the contract ?”

was not only wholly unsupported by any evidence in the case, but was contrary to the unanimous testimony of all the witnesses on the subject, including the sworn deposition of Walton Dwight himself.

4th. The answer of the jury in the negative to the forth question submitted to them, to wit :

“ Had Walton Dwight, at any time prior to
“ August 22d, 1878, had spitting of blood result-
“ ing from disease of the lungs or other respiratory
“ organs ?”

was not only wholly unsupported by any evidence in the case, but contrary to the unanimous testimony of all the witnesses on that subject.

5th. The answer of the jury in the affirmative to the fifth question submitted therein, to wit :

“ Was the ailment of Walton Dwight at Williams-
“ port in March, 1867, a mere temporary ailment
“ from which he recovered ?”

was not only unsupported by any evidence

in the case, but contrary to the unanimous testimony of all the witnesses on that subject.

6th. The answer of the jury in the negative to the sixth question submitted to them, to wit :

“ Was the policy of insurance on the life of
 “ Walton Dwight, in suit in this action, obtained by
 “ him with the preconceived design and intent to
 “ defraud the defendant ?”

was contrary to the evidence.

7th. The answer of the jury in the negative to the seventh question submitted to them, to wit :

“ Did Walton Dwight die by suicide ?”

was also contrary to the evidence.

8th. The general verdict found by the jury in favor of the plaintiffs was also contrary to the evidence.

It is not intended here to repeat the testimony which has been cited at length under the first point, and upon which the defendant confidently relied as entitling it to the dismissal of the complaint on the motion made at the close of the testimony. In considering the present point the Court is respectfully referred to the evidence as collated under the first point, and in the statement of facts hereto prefixed.

On a motion for a new trial, it is the duty of the Court to set aside a verdict even though there may be evidence in the case which, if standing uncontradicted, would be sufficient to support such ver-

dict, where the verdict is clearly against the weight of evidence and the justice of the case.

Colt *vs.* 6th Ave. R. R. Co., 49 N. Y., 671.

Hamilton *vs.* 3rd Ave. R. R. Co., 53 N. Y., 25.

In this latter case the late Mr. Justice Grover, in delivering the opinion of the Court of Appeals, in which all the judges concurred, lays down the rule as follows :

“The Special Term upon motion, and the General Term upon the appeal from its order, had power, and “*it was the duty of each*, to examine and determine whether the verdict was against the weight of evidence and the justice of the case, and if of opinion that it was, to set it aside and order a new trial. The further duty was incumbent upon them to examine whether upon the trial the defendant sustained any injury from the jury having been misled by any improper remarks of the Judge during the trial, which were not excepted to, or not the proper “subject of exception.” (At p. 27.)

In Smith *vs.* Ætna Life Insurance Co. (49 N. Y., 211) the Court say :

“The action of the Supreme Court was plainly right. It “is their duty to set aside a verdict which is against the “clear weight of the evidence ; not merely, as this is, against “the evidence. * * * * Justice would be promoted “if the Supreme Court should more frequently exercise its “unquestioned right of reviewing verdicts upon the facts.”

Of course if any one of the special findings shall be found by the Court unsupported by the evidence or contrary to the clear manifest weight of the evidence, and shall be set aside for that reason, the general verdict falls with it. If, for instance, the Court shall find that there was no evidence to sustain the finding of the jury in answer to the second question submitted to them, that Walton Dwight had not been engaged in the sale of beer, wine or

other intoxicating liquors at any time within five years prior to August 22d, 1878, within the intent and meaning of the contract ; or to sustain their finding in answer to the third question, that Dwight had not been *connected with* the sale of beer, wine or other intoxicating liquors at any time within five years prior to August 22d, 1878, within the intent and meaning of the contract, then there was a breach of warranty arising out of the answers made by Dwight in the application to the questions put on those subjects, and the general verdict should have been for the defendant. As has already been shown under the first point, there was not a scintilla of evidence of any description to sustain either of those findings. The unanimous testimony of all the witnesses, including Dwight himself, showed that during the three years commencing in the spring of 1874, and ending in the spring of 1877, he had steadily, without interruption, carried on the business of selling wines and liquors by the package as a business in connection with the hotel which he kept during that period, and that the answer given by Dwight to the questions put to him upon that subject in the application was wholly untrue. The learned Judge who tried the cause below, during the argument of the counsel who closed the motion for a nonsuit on the part of the defendant, used the following language :

" The Court.—There is no doubt about the fact that he
" had sold liquor, and he could not have sold liquor with-
" out being connected with the sale of liquor. There is no
" doubt about that."

P. 2193, Stenographer's notes of argument.

This was after the testimony had been closed, the motion had been opened and the plaintiffs had made their answer thereto.

The question actually submitted to the jury in-

volved no question of fact, but a mere question of law. As has been shown from the evidence, and as the learned Judge below admitted, there was no question about the facts. The jury, however, were relieved from finding on the question of fact by the form in which the question was put, and were permitted to give their construction of the intent and meaning of a contract which was in writing, and about which no controversy existed. They were permitted to usurp the province of the Court, and to pass upon a question of law which it was the duty of the Court to decide. If their finding is to be regarded as a finding of fact, as has been shown from the evidence, and as the learned Judge below admitted, the finding was not only contrary to the weight of evidence, but contrary to the whole evidence, and was utterly without evidence to sustain it. If their finding is to be regarded as a finding of matter of law, then that question has been mistried. The defendant was entitled to the judgment of the Court upon that question, and it was error to submit it to a jury who were utterly incompetent to deal with such questions.

Pratt *vs.* Hull.

Labar *vs.* Koplin.

The People *vs.* Cook, cited under Point I.

Again, the finding upon the question as to whether or not Dwight had had spitting of blood was not only contrary to the weight of evidence, but unsupported by any evidence in the case. It was in the face of the testimony of eye-witnesses to the spitting of blood; of the witnesses to Dwight's repeated declarations that that spitting of blood was the result of hemorrhages from the lungs; of the declarations of Dwight that these attacks were so serious as to create in his mind the apprehension that they would "carry him off" at some time; it was in the face of the testimony of

the witnesses present at the autopsy showing the existence in his lungs of fibrous nodules, which, in the opinion of the witnesses, recorded over their signatures at the date of the autopsy, was probably the result of old pulmonary phthisis ; it was in the face of the testimony of the medical experts as to how such fibrous nodules are produced, and what they indicate—that they proceed from and indicate ulceration of the lungs—a change of structure in the tissue of the lungs, the usual cause of hemorrhages of the lungs, showing conclusively that the spitting of blood testified to by the witnesses was the result of disease of the lungs, commonly known as consumption or phthisis, the existence of which disease was well known to Dwight, as shown by his repeated declarations on that subject. There was no evidence to contradict this testimony. The only attempt at evidence in that direction was the calling of witnesses who had known Dwight at different times and places other than the times and places when he was shown to have been afflicted with this disease, to testify that they had never seen him spit blood or known him to have such disease.

It is respectfully submitted that testimony of this character was entitled to no weight and raised no issue, and that the finding was contrary to the whole mass of testimony on the subject, and that this finding, therefore, like the others, should be set aside as contrary to the evidence. +

The finding upon the question of fraud was evidently controlled by the instruction of the Judge, to which exception was taken, and to which the attention of the Court will be called hereafter. That the said policy was, in point of fact, obtained by Dwight with the intent to cheat and defraud the defendant, no one, it is respectfully submitted, can question or doubt, who has carefully perused the testimony in this case.

So also as to the cause of death. While six

+ *Lomer v Meeker. Ubi Supra*

Leibert v Erie Ry Co. 49 Barb 583

Stafford's Admin v Leamy 34 Supr Ct R. 269.

medical experts of the highest character and attainments—the full number allowed by the Court—testified in the most positive manner, and in perfect harmony one with another, upon the evidence as to the history of the alleged sickness of Dwight, and the appearance presented by his body and the several organs thereof at the autopsy, that it was impossible that he could have died of any natural cause, and that it was impossible that he could have died from any cause other than asphyxia, resulting from mechanical strangulation, no one on the other side ventured to contradict this testimony in any respect, or advance any other opinion, as to what was the cause of death. The plaintiffs contented themselves with simply calling the infidel, Hull, and having him testify that he saw no rope, omitting to call either the hotel keeper, Spaulding, who was doing something to Dwight's tongue, or the plaintiff, Mrs. Dwight, who had the hands of her deceased husband immersed in hot water.

The attention of the Court is respectfully called, in connection with these several topics, to the statement of facts preceding these points, in which the testimony bearing on all these subjects is set out with appropriate references to the folios of the record. Can the Court say, upon this record, that these several findings and this general verdict based thereupon, are not, nor is either of them, contrary to the clear weight of evidence in this cause and to the justice of this case? If they cannot—if they find that either one of these findings of the jury is clearly contrary to the weight of evidence, or that the verdict based thereon is contrary to justice, then this verdict must be set aside under the rules of law, to which the attention of the Court has been called.

IV.

THE DEFENDANT'S EXCEPTIONS TO QUESTIONS PUT TO PLAINTIFFS' WITNESSES AS TO WHETHER THEY HAD EVER SEEN WALTON DWIGHT SPIT BLOOD, WERE WELL TAKEN.

Exceptions, fols. 1176, 1357.

Questions of this character were put to various witnesses on the part of the plaintiffs. At folio 1357, the Court will find, by reference to the record, that all questions of this class were, in due season, objected to as incompetent and immaterial. The Court overruled the objections so taken, and the counsel for the defendant duly excepted. It will be borne in mind that the defendant had given notice in its bill of particulars of its intention to prove that Dwight had spitting of blood at Williamsport, Pennsylvania, in the winter of 1866-7. Before the trial, the defendant had taken testimony under commission to establish that fact. On the trial, the defendant's counsel examined several witnesses who swore to the fact of having seen Dwight spit blood during his illness at Williamsport, in March, 1867. After the defendant had rested, the plaintiffs put witnesses on the stand who did not profess to have seen Dwight at or about the time of this illness, but who had known him and seen him at other times. Having such witnesses testify that they had not seen Dwight spit blood, had, therefore, no tendency to disprove the allegations or proofs of the defendant, or to raise any issue. Testimony of this character, it is respectfully submitted, was incompetent. Even if, however, the objection to its competency for any reason might not be sustained, it was clearly immaterial, had a tendency to mislead and confuse the minds of the jury, and the exceptions taken on

the ground of the materiality of the question should therefore be sustained.

V.

THE COURT BELOW ERRED IN OVERRULING THE OBJECTION TAKEN BY THE DEFENDANT'S COUNSEL TO THE QUESTION PUT TO THE WITNESS, SWINBURNE, AT FOLIO 1230, AS TO WHETHER OR NOT HE HAD HEARD "DR. AYRES SAY OR SUGGEST THAT THE "CREASES IN THE NECK WERE PROBABLY MADE "BY BENDING THE NECK BACKWARD AND FORWARDS, OR WORDS TO THAT EFFECT?"

This question was objected to as incompetent, and calling for hearsay evidence. It did not interrogate the witness as to a statement which he, the witness, was alleged to have made prior to giving his testimony, in conflict with his evidence given upon the stand, but as to an alleged declaration claimed to have been made by some other person, which was entirely incompetent. The defendant's exception to this ruling was therefore well taken.

VI.

THE EXCEPTION OF THE DEFENDANT'S COUNSEL TO THE RULING OF THE COURT BELOW, UPON THE OBJECTION TAKEN BY THE DEFENDANT TO THE QUESTION PUT TO THE WITNESS, ELIAS AYRES, AT FOLIO 1232, AS TO WHETHER THE WITNESS HAD HEARD DR. SWINBURNE "SAY, UPON ATTENTION "BEING CALLED TO THE CREASES IN THE NECK, "THAT THEY WERE PROBABLY MADE BY BENDING "THE HEAD AND NECK BACKWARD?" WAS WELL TAKEN.

No proper foundation for this question had been laid. The question put to Dr. Swinburne, which is the subject of the preceding point, and which was relied on as having laid the foundation for the question now under consideration, was in no respect identical with the question put to Mr. Ayres. The question put to Dr. Swinburne was as to his having heard some one else make a statement, not as to his own statements or declarations. The question put to Elias Ayres was as to a declaration alleged to have been made by Dr. Swinburne. Its only object could have been to show that Dr. Swinburne had made some declaration prior to giving his testimony on the stand inconsistent with such testimony. To make such evidence competent, the rules of law required the plaintiffs first to interrogate Dr. Swinburne as to whether or not he had made such statement. This the plaintiffs wholly failed to do.

VII.

THE COURT BELOW ERRED IN PERMITTING THE WITNESSES, FRANCIS W. DOWNS (fol. 1318), THEODORE F. McDONALD (fol. 1354), AND HENRY C. HERMANS (fol. 1535), TO TESTIFY, UNDER THE DEFENDANT'S OBJECTION, TO DECLARATIONS AND STATEMENTS MADE BY MRS. DWIGHT, AND THE DEFENDANT'S EXCEPTIONS TO THE RULINGS OF THE COURT ADMITTING SUCH TESTIMONY, WERE AND EACH OF THEM WAS WELL TAKEN.

These questions were objected to as incompetent and as calling for hearsay evidence. What Mrs. Dwight said on these several occasions could at best only be hearsay evidence and in no way competent.

VIII.

THE COURT BELOW ERRED IN ADMITTING TESTIMONY AS TO DWIGHT'S STATEMENTS AND DECLARATIONS ON THE SUBJECT OF HIS ALLEGED ILLNESS.

Several of the witnesses were permitted to testify as to what Dwight had said on this subject, namely: Francis W. Downs (at fol. 1324), Theodore F. McDonald (at fol. 1353), and Bessie D. McDonald (at fol. 1884). The counsel for the defendant in due season objected to the questions put to these several witnesses on this subject, but the Court overruled the objections so taken, and ad-

mitted the testimony. To this ruling the counsel for the defendant duly excepted.

It will be borne in mind that whether or not Dwight was sick at all at this time was directly in issue. Dr. Porter, who had made an examination of him for the purpose of ascertaining whether he was seriously ill or not, had been unable to find from his examination any evidence of any serious illness. All that he had been able to discover, aside from Dwight's own declarations, had been that his circulation was somewhat feeble, a condition which was fully accounted for by the drugs which Dwight admitted that he had been taking. The condition of Dwight's organs after death was such as utterly to refute the suggestion that he had had any congestive or other chill or malarial fever of any description, and to enable the experts to testify without any hesitation that it was impossible that he could have died from any natural cause. Although Dwight's own physicians, Drs. Orton and Burr, were both upon the stand, and although the Court held that it was competent for the plaintiffs, standing in the place of Dwight, to remove the seal which the statute had placed on the lips of doctors, neither of these physicians and no physician ventured to make a suggestion as to the character of Dwight's pretended illness, or to express any opinion as to the cause of his death, or to raise any issue with the testimony of the defendant's experts on that subject.

These declarations which are the subject of the exceptions now under consideration were the declarations of Dwight himself, in his own favor, and were therefore incompetent. That they had a tendency to affect the minds of the jury cannot be questioned. The defendant's exceptions to the rulings of the Court upon its objections to the admission of this testimony were therefore well taken.

IX.

THE COURT BELOW ERRED IN EXCLUDING THE QUESTION PUT TO THE WITNESS, McDONALD, UPON HIS CROSS-EXAMINATION AT FOL. 1393.

This witness, who was a brother-in-law of Walton Dwight, had been called, among other things, to prove that Dwight had been sick. It also appeared from the testimony, that he had been concerned in advancing money to pay premiums on policies of life insurance that Dwight had been obtaining just prior to his alleged illness. Under this state of facts he was asked, at folio 1393 :

“ Q. About how long was it after the time when you were “ paying part of his premium on life insurance before he “ first complained of being sick.?”

The question was objected to by the plaintiffs, on the ground that there was no foundation for the question (fol. 1394). The Court sustained this objection, to which ruling the counsel for the defendant duly excepted. It is respectfully submitted, that the question so excluded was a perfectly proper question upon cross-examination ; that the objection was untenable, and that the exception to the ruling of the Court sustaining such objection was well taken.

X.

THE COURT BELOW ERRED IN PERMITTING THE WITNESS, NERI PINE, TO TESTIFY, UNDER THE DEFENDANT'S OBJECTIONS, TO A CONVERSATION HAD BETWEEN HIMSELF AND WALTON DWIGHT, HIS CLIENT, ON NOVEMBER 15, 1878, RELATIVE TO PRETENDED ARRANGEMENTS CLAIMED TO HAVE BEEN MADE, WITH REFERENCE TO THE PAYMENT OF THE SECOND QUARTER'S PREMIUM, WHICH WOULD BE PAYABLE ON NOVEMBER 19, 1878, ON POLICIES OBTAINED BY DWIGHT.

The first question on this subject appears at folio 1427. The witness was there asked to

"Q. State whether, on the morning of that 15th day of November, 1878, he (Dwight) made arrangements with you relative to going to New York to pay the approaching premiums on his policies, and if so, what arrangements?"

After some objections and discussion, the Court (at fol. 1431) permitted the question to be put in this form:

"Q. Under the direction the Court has given, state what was said and done."

The objections taken by defendant's counsel appear at fol. 1428, and were upon the ground that the question was incompetent in itself, as calling for hearsay evidence; that it called for the declaration of the deceased in his own favor. And at folio 1432 the counsel expressly excepted to so much of the question, as modified, by the direction of the Court, as called for what was said on this subject.

The Court will recollect, that the defendant alleges, that the policy in question had been obtained by Dwight, with the preconceived design to

defraud the defendant ; that the application for the policy in suit was made in pursuance and in execution of a scheme to defraud the defendant and other insurance companies, by obtaining the largest amount of insurance possible for the smallest amount of money down, with the expectation and intention of paying not more than one premium, and of dying before the second premium should become payable. In support of this defence, a mass of testimony had been introduced on the subject of Dwight's financial condition. He had been shown to be overwhelmed with debts, to have been in bankruptcy, to have been obliged to borrow money from his brother to pay his board bills, to be owing debts to various persons of small amounts, the obligation to pay which he acknowledged, but which he was able to make no provision to pay, except by will. It had been shown that the money to pay the first quarter's premium on the policies actually obtained by him had been gotten partly by borrowing and partly from the discount of a note which his brother-in-law and his attorney had endorsed for that purpose, which note was not paid at maturity.

Upon this and other testimony it was contended that it was impossible that he could have expected to pay a second quarter's premium. To meet this overwhelming evidence it was proposed to have Dwight's own attorney testify as to his conversation with Dwight and Dwight's own declarations to him, for the purpose of arguing that Dwight had some reason to expect to be able to provide for this second premium. The evidence called for by the question under consideration was clearly incompetent. The question called for hearsay evidence. It called for Dwight's own declarations in his own favor, on a vital point in the case, made to his own attorney. The defendant's exception to the ruling of the Court upon this subject was therefore well taken.

XI.

THE COURT BELOW ERRED IN DENYING THE MOTION MADE BY THE DEFENDANT'S COUNSEL AT FOL. 1477, TO STRIKE OUT THE ANSWER OF THE WITNESS, NORMAN DWIGHT, TO THE QUESTION AS TO WHETHER OR NOT THE WITNESS KNEW OF DWIGHT'S "GOING TO CANADA, AND OF HIS CANADA OPERATIONS."

The witness answered this question as follows:

"A. I knew from the man that surveyed his Canada lands."

This answer was clearly based on hearsay, and therefore incompetent, and the defendant's exception to the refusal of the Court to strike it out was well taken.

XII.

THE COURT BELOW ERRED IN SUSTAINING THE OBJECTION OF THE PLAINTIFFS' COUNSEL AND EXCLUDING THE QUESTION PROPOSED TO BE PUT TO THE WITNESS, HERMANS, AT FOL. 1520.

The effort had been made on the part of the plaintiffs to establish that the witness, Hermans, was the agent of the defendant for the purpose of trying to charge the defendant with responsibility for his acts, and with knowledge of matters of which Hermans was alleged to have notice. The defendant's counsel had been permitted to cross-examine the witness, in the first instance, in regard

to his relations with the company. The plaintiffs had introduced in evidence an envelope, or policy pocket, in which the policy in suit had been forwarded. Upon this envelope, or policy pocket, was this endorsement: "Please notify the company of any change of your address." The contention of the plaintiffs' counsel, based upon this, was, that it was a notice addressed to Hermans as an agent of the defendant, and a recognition of that relationship. The cross-examination of the witness had shown that he was not their agent, which fact was placed beyond question by the correspondence introduced in evidence on such cross-examination. In this condition of the proofs, the witness being under cross-examination, the following question was put:

"Q. And the words which the learned counsel on the other side emphasized so strongly, 'Please notify the company of any change of your address,' do you understand to be intended as a notification to you or to the person insured?"

This question was objected to. The Court sustained the objection, and to this ruling the counsel for the defendant duly excepted. No ground of objection was stated. The witness, it will be observed, was a hostile witness. He had been employed as a broker by Dwight to obtain policies from various companies to the amount of \$100,000 or more. He was an expert in the business, and in that view could properly have been interrogated on this subject. The question called for his understanding as that of a person familiar with the business. His papers had been handed to the attorneys for the plaintiffs. The envelope in question was produced in such a way as to leave it doubtful whether it had been intended for him or for Dwight. In any event, the question was competent as testing the witness' good faith on the stand, and enabling the jury to judge of his credibility.

XIII.

THE COURT BELOW ERRED IN OVERRULING THE OBJECTION TAKEN BY THE DEFENDANT'S COUNSEL TO THE QUESTION PUT TO THE WITNESS, HERMANS, WHICH APPEARS AT FOLIO 1523, AND THE DEFENDANT'S EXCEPTION TO THIS RULING WAS WELL TAKEN.

This question was as follows :

"Q. State whether Mr. Dwight ever came to you to employ you to get life insurance for him ?"

The correspondence between the witness, Hermans, and the defendant, introduced in evidence on his cross-examination, appears in the appendix at folios 2673 to 2678. It was opened by the witness, Hermans, by a letter dated August 16, 1878, in which he says :

"I have a case of a party who wants placed in good companies about \$100,000 insurance on his life, and my company will only take \$10,000 on any one life. Please write me what brokerage you can allow me " (fol. 2673).

The attempt on the part of the plaintiffs was to show that Hermans was employed by the defendant, and not by Dwight. The question under consideration was objected to on the ground that the witness was incompetent to state whether or not Mr Dwight came to him for that purpose. Unless that purpose was declared, no person but Dwight could answer the question, and Dwight's declaration would be incompetent as hearsay. Clearly the witness was not competent to answer as to the purpose of Dwight's visit without such declaration.

XIV.

THE COURT ERRED IN OVERRULING THE OBJECTION TAKEN BY THE DEFENDANT TO THE FOLLOWING QUESTION PUT TO THE WITNESS, HERMANS, AT FOLIO 1544 :

“ Q. COULD HE WALK ALONE, APPARENTLY ? ”

This question was objected to on the ground that the witness was not shown to be competent to give an opinion on the subject. The exception to this ruling was therefore well taken.

XV.

THE COURT ERRED IN OVERRULING THE OBJECTION TAKEN BY THE DEFENDANT'S COUNSEL TO THE FOLLOWING QUESTION PUT TO THE WITNESS, HERMANS, AT FOLIO 1558 :

“ Q. WHAT CONVERSATION HAD YOU WITH HIM
“ RELATIVE TO THIS POLICY, IF ANY ? ”

THE COURT ALSO ERRED IN DENYING THE MOTION MADE BY THE DEFENDANT'S COUNSEL TO STRIKE OUT THE ANSWER GIVEN BY THE WITNESS TO THIS QUESTION, AND THE DEFENDANT'S EXCEPTIONS TO THE RULINGS OF THE COURT IN ADMITTING THE EVIDENCE AND REFUSING TO STRIKE IT OUT, WERE WELL TAKEN.

This question called for a conversation between the witness, Hermans, Dwight's broker, and Mr. Doremus, the secretary of the defendant, some

time in the month of October, 1878. The transaction between Dwight, represented by Hermans on the one side, and the defendant on the other, it will be recollected, was fully closed and consummated by the delivery of a policy on the 28th of August. Evidence of this conversation, therefore, between Hermans and Mr. Doremus in October was clearly incompetent, irrelevant and immaterial. The statements of Mr. Doremus at that time were in no sense declarations made in the course of business of the defendant, in effecting the insurance which is the subject of controversy in this action.

Mr. Hermans appears to have been there in October on his own behalf, endeavoring to earn another brokerage. It does not appear that he was acting or pretending to act on anybody's behalf but his own, and what he said to Mr. Doremus or what Mr. Doremus said to him, could have no bearing upon any question at issue in the cause.

XVI.

THE COURT ERRED IN OVERRULING THE OBJECTION TAKEN BY THE DEFENDANT'S COUNSEL TO THE FOLLOWING QUESTION PUT TO THE WITNESS, HYDE, (fol. 1581) :

"Q. WILL YOU BE KIND ENOUGH TO STATE WHETHER, IN THAT EXAMINATION, ANYTHING PECULIAR OR OUT OF THE ORDINARY COURSE OF THINGS WAS DISCOVERED? I AM SPEAKING NOW OF THE PART BELOW THE BREAST."

This witness was the first medical witness called on the part of the plaintiffs to rebut the defendant's

testimony. The question which is the subject of the exception now under consideration was objected to on the ground that the witness should not be permitted to state the result of a comparison made in his own mind, between the appearances presented by Dwight's organs at the autopsy and the appearances presented by the organs of other dead bodies which had come under his observation, but should indicate what he did see. In other words, the ground of objection was that the question did not call for facts, but called for the conclusion of the witness upon a state of facts not disclosed. The defendant's counsel insisted that the witness should be required to state what he observed, what the condition of the several organs was ; not whether the witness was of opinion that the conditions of these organs, which he did not state, was or was not out of the ordinary course of things. He should have been required to state the facts so that the opinion of other witnesses upon those facts could have been obtained.

The same question was repeated in a somewhat different form at folio 1583, but still open to the same objection. It was objected to on the same ground. The Court overruled the objection, and the defendant's counsel excepted. It is submitted that this exception was well taken.

XVII.

IT WAS ERROR ON THE PART OF THE COURT BELOW TO SUSTAIN THE OBJECTION TAKEN TO THE FOLLOWING QUESTION PUT TO DR. WOOD AT FOLIO 1969, NAMELY:

“ Q. WILL YOU STATE THE FACTS UPON WHICH
“ YOU BASE THIS ANSWER? ”

By reference to the record it will be observed that toward the close of the defendant's case, expert witnesses were introduced, to whom hypothetical questions, based upon the evidence as it then stood, were put touching the cause of death. The plaintiffs, by way of rebuttal, then introduced witnesses whose testimony tended to vary in some respects the evidence on that subject as it stood at the close of the defendant's case. Among other witnesses, the plaintiffs had called Bessie McDonald, a half sister of Dwight, and had her testify to what Dwight's apparent condition was on the occasion of a visit made by her to him during his alleged illness. It became, therefore, necessary for the defendant, by way of surrebuttal, to recall the experts for the purpose of having them testify as to the effect upon their judgment previously given of the new testimony so introduced by the plaintiffs. New hypothetical questions, embracing the new facts introduced by the plaintiffs, were therefore put to the experts. After the general hypothetical question, based upon this new evidence, had been put to Dr. Wood, the question, which is the subject of the present exception, was proposed. The object was to have the witness state the precise facts from which his conclusion was drawn, so that the Court and jury might be able to judge of what bearing, if any, the new facts elicited after the previous ex-

amination of the witness had upon his judgment. The question put was not open to the objection taken by the plaintiffs on which the question was excluded. It did not tend to re-open the case. There had been no examination of the defendant's witnesses with reference to the effect which the new facts elicited from the plaintiffs' witnesses after the defendant had rested its case would have, if any, upon the conclusion of the experts as to the cause of death. The question put to the same witness, at fol. 1975, which was objected to and excluded on the same ground, was of the same character. The defendant duly excepted to the ruling of the Court upon each of these questions, and such exceptions were, for the reasons stated, well taken.

XVIII.

THE COURT BELOW ERRED IN EXCLUDING THE FOLLOWING QUESTION, PUT TO DR. SHERMAN AT FOL. 2008, NAMELY :

“Q. WHAT WAS THE RESULT OF THOSE EXPERIMENTS ?”

The object of the question was to show, by a witness who, from actual experience, had knowledge on the subject, as to whether or not the heavy indentations which were observed on both sides of the neck of Walton Dwight at the time of the autopsy by all the fifteen physicians present who took part in that proceeding, could have been produced in the manner intimated by the plaintiffs'

witnesses, all of whom had admitted that they had no knowledge or experience on the subject.

The Court will recollect, that after the close of the defendant's case, the plaintiffs had started the theory that these indentations were the result of the raising of the head of Dwight when placed in the ice box, and lowering it to the level of the body when it was taken from the ice box at the time of the autopsy. The inherent absurdity of this theory has already been pointed out. Any indentation produced in the way suggested would, of course, be more visible while the head was bent forward, and would be most discernible immediately in front. Lowering the head would necessarily have the effect of again straightening the skin and underlying tissues, and removing any indentation or groove produced by raising the head. In the case of Dwight, while there was no indentation immediately in front, all the witnesses observed the heavy indentation noted in the record of the autopsy on both sides of the neck, running upwards and backwards at an angle of about 45 degrees.

The question now under consideration called for the absolute knowledge of a witness derived from actual experiment and experience of the effect produced upon dead bodies by being subjected to precisely the treatment to which that of Dwight had been subjected. The witness was not asked to state in detail the several cases with which he was familiar, but the general effect or result derived from his personal experience and knowledge of such treatment. In this view the question was eminently both competent and proper, and the defendant's exception to its exclusion was well taken.

XIX.

IT WAS ERROR ON THE PART OF THE COURT BELOW TO EXCLUDE THE FOLLOWING QUESTION PROPOSED BY THE DEFENDANT AT FOL. 2030, TO BE PUT TO DR. BRIDGES, NAMELY :

“Q. DOES THE FURROW PRODUCED IN THE NECK
 “AFTER SUICIDAL HANGING ACQUIRE ITS DARK
 “BROWN COLOR IMMEDIATELY OR AT SOME PERIOD
 “OF TIME AFTERWARD ?”

The objection taken by the plaintiffs to this question, on which it was excluded by the Court, was that it would be re-opening the case.

In considering this question the Court will remember that down to the time when the defendant first rested its case, there was no controversy or question either about the existence of the heavy indentations on both sides of the neck of Dwight described in the notes of the autopsy which were subscribed by the fifteen physicians present, or as to the character of those indentations.

Nothing down to that time had taken place to suggest that any question would be attempted to be raised on that subject. The plaintiffs' theory on which they sought to account for these indentations was only suggested after the defendant had rested.

The testimony, therefore, sought to be elicited by the question now under consideration was in all respects proper and competent by way of rebuttal, and the objection upon which it was excluded was unfounded, and the defendant's exception to the exclusion of this testimony was well taken.

XX.

THE DEFENDANT WAS ENTITLED TO THE INSTRUCTION ASKED FOR IN ITS FOURTH REQUEST TO CHARGE (FOL. 2210), AS FOLLOWS :

“FOURTH. — IF THE PRINCIPAL BUSINESS OF
“DWIGHT FOR TEN YEARS LAST PRECEDING AUGUST 22D, 1878, WAS NOT THAT OF REAL ESTATE
“AND GRAIN DEALER, PLAINTIFFS CANNOT RECOVER.”

THE COURT REFUSED SO TO CHARGE, AND TO SUCH REFUSAL THE DEFENDANT DULY EXCEPTED (EXCEPTION, FOL. 2222).

As before shown, the Court had already, in conformity with the settled law of this State, decided that the policy and application together constituted the contract between Dwight and the defendant; that by that contract the validity of the policy was made to depend upon the truth of statements and representations contained in the application, that the materiality of each and every answer made by Dwight to the questions contained in the application was agreed to by the parties, and that the sole question as to each of said answers was as to whether or not the answer was true.

The second question in the application (Exhibit 21, fol. 2364) called for the business of the applicant, and a note upon the face of the application warned the applicant that this business must be carefully specified.

Subdivision C interrogated him as to the occupation that he had been engaged in during the last ten years. The question called for a regular business or occupation, not for a special speculation or operation.

The learned Judge, in his charge, had dwelt at considerable length upon the history of the improvements on Mrs. Dwight's property at Dwightville, in connection with the question as to Dwight's occupation (fols. 2063, 2071), and upon the ownership by Dwight, at some time, of wild lands in Wisconsin and elsewhere, the only evidence on which subject was found in the schedules in bankruptcy, which had been introduced for the purpose of showing by the record the history of Dwight's bankruptcy proceedings, and not as evidence of the facts contained in the papers, and which furnished no competent evidence on that subject. While telling the jury, as he did at fol. 2073, that "the term 'occupation' has a definite meaning, and it means the general business in which a man has been engaged ; it means his calling, his trade, his avocation," he declined to give the instruction asked for in this request. It is respectfully submitted that the remarks of the Court to the jury on this subject, in connection with his refusal to give the instruction asked for, had a tendency to mislead the jury, to divert their minds from the real question, and to lead them to find against the defendant upon a question as to which there was really no controversy upon the evidence. Dwight himself might reasonably be supposed to have known what his business was when he deliberately testified under oath, on the 18th of February, 1878, that from 1868 to the time when he opened the Dwight House, his sole business had been his "law-suits, general living, and the like of that," and that he had no business of his own, and that, from May, 1874, to March, 1877, the Dwight House was the only business he had as a regular business.

The defendant duly excepted not only to the refusal of the Court to charge in accordance with this request, but to the charge actually delivered, so far as the same was in conflict therewith. The result of the instruction given in connection with the re-

fusal to instruct as requested, was a finding by the jury in conflict with the evidence.

XXI.

THE DEFENDANT ALSO EXCEPTED SPECIFICALLY TO CERTAIN PORTIONS OF THE CHARGE OF THE COURT ON THE SUBJECT OF DWIGHT'S OCCUPATION, TO WIT, TO SO MUCH OF THE CHARGE AS INSTRUCTED THE JURY THAT THERE IS EVIDENCE THAT SOME TIME IN 1877 OR 1878, DWIGHT ENGAGED IN OPERATIONS IN GRAIN IN CHICAGO (CHARGE, FOL. 2066 ; EXCEPTION, 2197).

ALSO, TO SO MUCH OF THE CHARGE AS INSTRUCTED THE JURY THAT THE EVIDENCE SHOWS THAT THE ACCOUNT OF THE MONEY EXPENDED FOR THESE VARIOUS IMPROVEMENTS WAS KEPT IN HIS NAME ; THAT THE LAND WAS ASSESSED TO HIM, AND THAT THE RENTS AMOUNTED TO A VERY CONSIDERABLE SUM (CHARGE, FOL. 2072 ; EXCEPTION, FOL. 2197).

ALSO, TO SO MUCH OF THE CHARGE AS INSTRUCTED THE JURY THAT THE EVIDENCE FURTHER DISCLOSED THAT DURING THIS PERIOD OF TIME HE OWNED A CONSIDERABLE QUANTITY OF LAND IN WISCONSIN (CHARGE, FOL. 2072 ; EXCEPTION, FOL. 2198).

There was no evidence competent to submit to the jury as to Dwight's ever having been engaged in grain operations in Chicago. The only suggestion on that subject is found in the witness, Phillips', statement of a conversation had by him with

Dwight with reference to the granting of a policy on Dwight's life by the Washington Life Insurance Company, in which Phillips details an amusing story told by Dwight, which will be found at fol. 542.

As to the land business, the only reference to that subject in the record outside of McDonald's testimony as to the improvement of Dwightville after the settlement made on Mrs. Dwight in 1868, is to be found in the bankruptcy schedules which were introduced in evidence in the manner hereinbefore stated as evidence of the proceedings taken, but not as evidence of the matters contained in the papers.

But no evidence of any dealing in real estate within ten years prior to 22d August, 1878, can be found in those schedules, competent or incompetent.

XXII.

THE DEFENDANT WAS ENTITLED TO THE INSTRUCTION ASKED FOR IN ITS FIFTH REQUEST TO CHARGE, WHICH WAS AS FOLLOWS :

"FIFTH. IF WALTON DWIGHT, WHILE HE KEPT "A HOTEL IN BINGHAMTON, WAS CONNECTED WITH "THE SALE OF LIQUOR, THE PLAINTIFFS CANNOT "RECOVER" (FOL. 2211).

THE COURT REFUSED SO TO CHARGE, TO WHICH REFUSAL THE DEFENDANT DULY EXCEPTED" (EXCEPTION, FOL. 2222).

The evidence on this subject upon which this

request was based, has been already stated at large under the first point. The question in the application (Exhibit 21, fol. 2364) on which this request was founded, is subdivision D of question 2, and is as follows :

“ Is he (Dwight) now, or has he been engaged in
“ or connected with the manufacture or sale of any
“ beer, wine or other intoxicating liquors ?” The answer was, “ No.”

The Court had decided that by the contract of these parties the validity of the policy was made to depend upon the truth of the statements and representations contained in the application, and that the materiality of each and every answer made by Dwight was agreed to by the parties. The evidence showed without contradiction that Dwight for three years—from 1874 to 1877—had kept a hotel, in connection with which he had a wine room, from which he sold day by day wines and liquors by the package, regularly applying for licenses to conduct this business, and paying the United States tax on the sales so made.

The Court had refused to non-suit on the proved falsity of this answer, and insisted upon submitting to the jury a question which, under the guise of a question of fact, presented nothing but a question of law, and called for the construction by a jury of the terms of a contract which it was the duty of the Court to construe. If, as the Court had decided, and as we have shown by the decisions of the Court of Appeals, the application and policy together constituted the contract between the parties, and by the terms of that contract the validity of the policy was made to depend upon the truth of the statements and representations contained in the application, and the materiality of each and every answer made by Dwight to those questions was agreed to by the parties, the counsel for the appellant is unable to imagine any possible theory upon which the refusal to give the instruction asked for

by the defendant and now under consideration, can be justified.

XXIII.

THE DEFENDANT WAS ENTITLED TO THE INSTRUCTION ASKED FOR AT FOL. 2170, WHICH WAS AS FOLLOWS :

THAT THE "QUESTION, 'HAS HE BEEN ENGAGED IN, OR CONNECTED WITH THE MANUFACTURE OR SALE OF LIQUOR?' IS A QUESTION THAT MAY BE TRUTHFULLY ANSWERED, 'YES,' IF HE HAD BEEN CONNECTED WITH THE SALE OF LIQUOR." AND THE REFUSAL TO GIVE THIS INSTRUCTION, TO WHICH THE DEFENDANT DULY EXCEPTED (FOL. 2171), WAS ERROR.

It will be observed by referring to the record that in answer to this request the Court declined to charge on this subject differently from what he had already charged. The charge on this subject will be found commencing at fol. 2075. At fol. 2077 the learned Judge tells the jury that the "plaintiffs insist that this question is a compound one, and is incapable of an affirmative or negative answer, or of a truthful, affirmative or negative answer. They say that if he had answered this question, 'Yes,' it would have been just as false as though he had answered it 'No,' because they say if he answered it 'Yes,' he would have said he had been connected with the manufacture of liquors, which is in no respect true."

After giving the Court's understanding of the

defendant's views upon this question, the Court proceeds to submit the question to the jury as to whether or not the answer that was given, "No," is a *fair and true answer within the intent and meaning of the contract*; and at fol. 2080 the Court continues:

"Gentlemen, you have heard the evidence in respect to this question—I have gone over with it, substantially—not in entire detail, and it is for you to say whether, taking the question as put, and the purpose for which it was put, it was fairly and truly answered."

The defendant duly excepted to each and every portion of the charge actually delivered, so far as the same was in conflict with this request (fol. 2222).

Also to each and every modification of the proposition embraced in said request (fol. 2222).

Now, was not the defendant entitled to the instruction asked for? Was not the charge actually delivered calculated to mislead? The Court had stated the contention with reference to the character of this question and the alleged impossibility to answer it truthfully, "Yes," or "No." The Court had told the jury that while there was no question but what Dwight had, during three years, sold liquor by the package from the wine room kept at the Dwight House, day by day, and that a man could not sell liquor without being connected with the sale of liquor, there was no evidence that Dwight had been engaged in or connected with the manufacture of liquor.

In this connection the defendant asked the Court to instruct the jury in conformity with the request now under consideration. Having thrown a mist about the subject by dwelling upon the plaintiffs' attempt to avoid the effect of this warranty, the Court was asked to instruct the jury as to what the question really meant. It is impossible to imagine a ground upon which this refusal can be justified.

That the jury were misled by the suggestions of the counsel for the plaintiffs, repeated by the Court, and thus induced to find a verdict contrary to the whole evidence on the subject, cannot be doubted.

See cases cited under Point I.

XXIV.

THE DEFENDANT ALSO SEPARATELY EXCEPTED TO THAT PORTION OF THE CHARGE RELATING TO THE SALE OF LIQUOR WHICH INSTRUCTED THE JURY THAT IT WAS FOR THEM "TO SAY WHETHER, TAKING THE
" QUESTION AS PUT, AND THE PURPOSE FOR WHICH
" IT WAS PUT, IT WAS FAIRLY AND TRULY ANSWER-
" ED (fol. 2080).

Exception, fol. 2198.

It is respectfully submitted that this exception was well taken ; that there was no question as to the purpose for which the question in the application was put to Dwight, which it was competent to submit to the jury.

XXV.

THE DEFENDANT WAS ENTITLED TO THE SEVERAL INSTRUCTIONS ON THE SUBJECT OF SPITTING OF BLOOD EMBRACED IN THE 6TH, 7TH, 8TH, 9TH AND 10TH REQUESTS (fols. 2211 to 2214), AND THE REFUSAL OF THE COURT TO GIVE THE INSTRUCTION ASKED FOR IN SAID REQUESTS RESPECTIVELY, TO WHICH REFUSAL IN EACH CASE THE DEFENDANT SEPARATELY EXCEPTED, WAS ERROR.

The charge relating to this general topic will be found commencing at fol. 2081. Can it be said that spitting of blood, accompanied by a cough, and resulting from hemorrhage of the lungs or other organs of respiration, does not amount to a disease? That a man who has had repeated attacks of this description, during which he has raised blood in various quantities and mucus streaked with blood, which he knows and has declared proceeded from and were the result of hemorrhages of the lungs, can conceal these facts, and, in answer to a question as to whether he has ever had, among other diseases, spitting of blood, the truth of which answer he warrants, say "No," without qualification? Was not the defendant entitled to have the jury take into consideration the testimony of the witnesses to the fact of spitting of blood, the declarations of Dwight that he had had hemorrhages of the lungs, the condition of his lungs, as disclosed on the *post mortem* examination, and the medical testimony as to the origin of the conditions there found? If the defendant was entitled to have the jury consider these matters then the Court erred in declining to instruct as requested in the eighth request.

Was it not the duty of Dwight, in view of the fact that his mother had died of consumption, as disclosed by the application, and that for that

reason any symptom showing a predisposition on his own part to such disease would form an important factor in the decision as to whether or not a company should grant a policy upon his own life, and in view of the fact that he had had repeated attacks of spitting of blood, which he had understood and declared to be the result of hemorrhages of the lungs, to state the fact of his having had such spitting of blood in answer to the question put to him upon the application, even though he were not certain as to the origin of the blood which he supposed to proceed from his lungs? And did not the answer in the negative, without qualification, involve not only a breach of warranty, but a positive fraud? If this be so, it was error to refuse the instruction asked for in the defendant's tenth request.

In a like case in the Court of Exchequer it was held, that

"The expression in a life policy that the assured has not
 "had any spitting of blood does not mean that he has in
 "fact never spat blood, but that he has not spat blood
 "either from unascertained causes or from a disease tending
 "to shorten life."

In that case (*Geach vs. Ingall*, 9 Jurist, 691), the Lord Chief Justice, in summing up, in the course of his charge, told the jury :

"That it was for them to say whether, at the time of
 "making the statement set out in the declaration, the
 "assured had had such a spitting of blood and such
 "affection of the lungs and inflammatory cough and such
 "a disorder as would have a tendency to shorten life,"
 "&c.

The jury having found all the issues in favor of the plaintiffs, a motion was made for a new trial upon the ground, among others, that the Judge misdirected the jury in telling them to consider whether the spitting of blood was of such a nature as to endanger the life of the assured. If he had

spat blood from any cause, the fact ought to have been mentioned by him in order that the company might be put upon inquiry.

A rule to show cause was granted, and after hearing was made absolute.

In deciding the motion for a new trial on this rule, Pollock, C. B., said :

“ On the second point, however, the Judge misdirected the jury, and, as there must be a new trial, the less we say about the evidence the better. By the expression ‘spitting of blood,’ is no doubt meant the disorder so called, whether proceeding from the lungs, stomach or any other part of the body ; still, however, one single act of spitting of blood would be sufficient to put on inquiry as to the cause of it.”

Alderson, B., used the following language on this subject :

“ By spitting of blood must be understood a spitting of blood as a symptom of disease tending to shorten life. The mere fact is nothing—a man cannot have a tooth pulled out without spitting blood. But on the other hand, if a person has a habitual spitting of blood, although he cannot fix the particular part of his frame whence it proceeds, still, as this shows a weakness of some organ which contains blood, he ought to communicate the fact to the insurance company, for no one can doubt that it would most materially assist them in deciding whether they could execute the policy, and good faith ought to be kept with them. So if he had only spitting of blood once, but that once was the result of the disease called spitting of blood, he ought to state it, and his not doing so would probably avoid the policy.”

Rolfe, B. said :

“ I have no doubt that if a man had spitting of blood from his lungs, no matter in how small a quantity, or even had spitting of blood from an ulcerated sore throat, he would be bound to state it. The attack should be known to the office in order that their medical man might make inquiry into its cause.”

On these views of the law, the rule was made absolute, and a new trial ordered.

It was error, therefore, to refuse the instruction asked for in the defendant's tenth request.

XXVI.

THE COURT ERRED IN THE FOLLOWING INSTRUCTIONS GIVEN TO THE JURY AS TO THE DEFENDANT'S RIGHT TO A VERDICT ON THE GROUND OF FRAUD, VIZ. :

" THAT THE DEFENDANT IS NOT ENTITLED TO
" A VERDICT ON THIS GROUND UNLESS YOU FIND THAT
" THE FRAUD WAS CONSUMMATED BY THE WILLING
" DEATH OF WALTON DWIGHT BY SELF MURDER—BY
" SUICIDE " (FOL. 2161).

THE COURT ALSO ERRED IN REFUSING TO CHARGE ON THIS SUBJECT AS REQUESTED BY THE DEFENDANT IN ITS ELEVENTH REQUEST (REQUEST, FOL. 2214).

THE DEFENDANT DULY EXCEPTED TO THE REFUSAL OF THE COURT TO CHARGE AS REQUESTED, AND TO EACH AND EVERY PORTION OF THE CHARGE ACTUALLY DELIVERED SO FAR AS THE SAME WAS IN CONFLICT THEREWITH, AND PARTICULARLY TO THE PORTION OF THE CHARGE EMBRACED IN THIS POINT (FOLS. 2200-2222).

By reference to the answer it will be seen that the issue of fraud was tendered in three aspects:

First.—In the second defence set up in the answer at fol. 45, the defendant alleges that the answers and statements in the application which are

set out at length in that defence were each and every of them material to the risk which the defendant was asked to assume, and upon the question as to whether or not the policy should be granted by the defendant, and that each and every of the said answers and statements contained in said application and specified in said defence, was false and untrue.

At fol. 46, the defendant alleges that the facts as to Dwight's occupation were fraudulently suppressed by him ; that instead of his business being that of a real estate and grain dealer, as stated by him, his business had been that of a hotel keeper, in the course of which he had been engaged in and connected with the sale of intoxicating liquors. And after pointing out the respects in which the answers made in the application were claimed to be false and untrue, the defendant (fol. 48) says, that by reason of said untrue and fraudulent answers to the said questions put to the said Dwight upon his application for the said policy, and his said false statements and suppressions and concealments of material facts, and breaches of warranty, the said policy number 69,096 was rendered null and void, and of no effect, and was forfeited, and this defendant was and is released and discharged from any and all liability thereunder.

Second.—The fourth defence (fol. 49) charges that Dwight procured the policy in suit with the preconceived intent to cheat and defraud the defendant by thereafter taking his own life, and thus defrauding the defendant of the amount of the policy, and that he thereafter did take or procure the taking of his own life.

Third.—The fifth defence (fol. 51) alleges the formation of a design by Dwight and a conspiracy with one or more persons to defendant unknown to commit a fraud upon a number of life insurance

companies, including the defendant, and sets out at length a fraudulent scheme in pursuance and part execution of which it is alleged that policies to the amount of two hundred and fifty thousand dollars, including the policy in suit, were procured by him, and after alleging the various steps in the execution of this fraudulent scheme and design, charges that Dwight did, in further execution thereof, wilfully and feloniously take his own life, and alleges, at fol. 56, that by reason of the premises the policy never had any validity, and the defendant is not and never was liable thereon for the payment of any sum whatever.

Now, as to the first aspect in which this question is presented: if the jury, but for the instruction of the Court, could have legitimately drawn from the evidence the inference or conclusion that the statements made by Dwight, in answer to the questions put to him in the application, were fraudulently made, or that he fraudulently suppressed facts with respect to his business or condition of health, as to which good faith required the defendant to be advised, then the instruction that the defendant was not entitled to a verdict on the ground of fraud, unless the jury found that the fraud was consummated by the willing death of Walton Dwight by self-murder—by suicide, was clearly error.

The question as to false answers made with a fraudulent intent and the fraudulent concealment and the suppression of other facts material to the risk, it will be observed, was an entirely separate and distinct question from that as to breaches of warranty, and constituted a ground of defence separate and distinct from the ground set forth in the fourth and fifth defences. If the jury were entitled, giving to the proofs the construction most favorable to the defendant in that regard, to draw therefrom the inference that Dwight made any fraudulent mis-statement, or was guilty of any fraudulent concealment of facts affecting the risk

in his application for the policy, then the policy would be void on that ground, and the instruction complained of was clearly erroneous.

But it is submitted that the instruction complained of, and the refusal to give the instruction asked with respect to this question of fraud, was also contrary to law, so far as it related to the other defences on the ground of alleged fraud.

In considering the defendant's exceptions in this aspect, it must be assumed that the jury would have drawn from each and every item of evidence upon the subject of fraud the inference most favorable to the defendant. Beyond controversy there was evidence sufficient to sustain a finding by the jury, that Dwight had, about the date of the filing of the briefs, on his application for a discharge in bankruptcy, conceived and concocted a fraudulent scheme and design, for the purpose of making provision for his family by obtaining the largest amount of insurance possible on his life, by paying the smallest amount of money down, and that, at or about this time, he proceeded to put such scheme into execution; that at the time he made these applications, his financial condition was such as to preclude the idea of his expecting to pay more than the first premium; that he was borrowing money to pay his board; that the money to pay his first quarter's premium on the policies actually obtained was procured partly by borrowing, and partly by discounting a note with the endorsement of two of his friends; that some of the policies applied for, in pursuance of this scheme, were gotten into his possession by fraudulently conspiring with the agents of the companies to give false information to their principals; that after having, in pursuance and execution of this fraudulent scheme and design, gotten into his possession all the policies possible, including the policy in suit, he pursued a course of life, swimming streams, "drinking surface water of brooks and sometimes of swamps,

and oftentimes it was none of the best ;” that this course was pursued for the purpose of laying the foundation for saying that he was unwell in order that it might be claimed that the death which he premeditated was a natural death ; that having made a will, in which he admits that his estate is made up mostly of life insurance, and that he has lived to that age and been subject to such experiences that he has no further ambition for himself beyond leaving his family comfortable and with sufficient means to enable them to live as they were in the habit of theretofore, he went to Binghamton and pretended to be sick ; that the only symptom indicating any disease which was discernable by a physician was an apparent feebleness of circulation, which was abundantly accounted for by the drugs which he was admittedly taking ; that he died suddenly from causes which no one has ventured to suggest except the defendant’s witnesses, who unanimously agreed that he could not have died from any natural cause.

Evidence was presented to the jury tending to establish each and every of these facts, and from them the jury were entitled to draw the inference that the policy in suit was obtained by Dwight with the preconceived design and intent to defraud the defendant, and in part execution of the fraudulent scheme alleged in the answer, and that it was not at the time he obtained the policy and never was his intention in good faith to pay premiums as stipulated by the contract, and that that fraudulent design and intention continued down to the moment of his death.

The question upon this condition of proofs is presented, as to whether or not, under the law of this State, a man may deliberately form and put into execution a scheme to defraud, such as has been proved in this case, and bring this fraudulent scheme to a successful issue by dying three days before the second premium becomes due, from

causes which his own physicians are unable to explain, and that although the jury may be of opinion that each and every step in the programme of fraud down to the actual death of the party committing it has been fully established by the evidence, yet because a question as to the actual cause of death remains upon the minds of the jury no redress is left to the parties who have been the victims of this fraud? Does the law of the State of New York sanction such a doctrine? To test its soundness, we may assume that Dwight had proceeded so far that the cord was adjusted about his neck, that it was suspended from the projecting head-board of his bed, that he was leaning forward with sufficient pressure to exclude the air from his lungs with still the determination to take his own life, and thus secure the realization of his scheme of fraud; but while in this condition and in this state of mind, by a stroke of lightning, by an assassin's bullet or by other means which it would have been impossible for him to have foreseen, he was instantly killed. Under such circumstances he would not have died by self murder—by suicide. Would the law sanction a recovery from the defendant on a policy so obtained upon such a state of facts? If it would not, then the instruction complained of cannot be sustained. Could that lightning stroke or assassin's bullet deprive the defendant of a right to have the policy declared void and cancelled on the ground that it had been fraudulently obtained? If it could not, then the same facts which would have been available in an action brought by the defendant for the cancellation of the policy, are available as a defence to the action brought upon the policy.

Courts of law have concurrent jurisdiction with Courts of equity in cases of fraud, and will not permit a plaintiff to recover in any case where, upon the same evidence of actual or constructive fraud, a Court of equity would decree against it.

Fleming *vs.* Slocum, 18 Johns. R., 403.

Tomlin *adsm.* Den., 19 N. J. L., 76.

The essential fact in such cases is that the delivery of the policy was obtained with intent to defraud

Devoe v Brandt

53 N. Y. 462.

XXVII.

THE DEFENDANT WAS ENTITLED TO THE INSTRUCTION ASKED FOR IN THE SIXTEENTH AND SEVENTEENTH REQUESTS SUBMITTED, AND THE REFUSAL OF THE COURT TO INSTRUCT AS REQUESTED—TO WHICH REFUSAL THE DEFENDANT EXCEPTED SEPARATELY IN EACH CASE—WAS ERROR.

Requests, fol. 2218.

Exceptions, fol. 2222.

By the requests referred to in this point, the Court was asked to instruct the jury, that if at the time of making the application for the policy in suit Dwight was not insured in the Connecticut Mutual Life Insurance Company, or was not insured in the Mutual Life Insurance Company of New York, the plaintiffs could not recover.

The sixth question which Dwight was required to and did answer, in the application to the defendant, was as follows :

“ 6. *A.* Whether the party to be assured is now, or
“ has been insured in this company? If so, state the
“ number of the policy and the amount.

“ *B.* Whether in other companies? in which, and
“ for what amount in each? State exactly on what
“ kind of policy.”

The answer made by Dwight to subdivision B, of this question, was as follows :

“ *B.* Yes. N. Y. Mutual, 15 year endowment, 10,000 ;
“ Conn. Mutual, Ordinary Life, 15,000 ;” * *

* *

Exhibit 21, fol. 2364.

The evidence on the subject of this alleged insurance in these two companies will be found collated

under Point I. Upon that evidence it was insisted at the trial, that the defendant was entitled to a non-suit, and the refusal to non-suit on that ground is one of the alleged errors presented to this Court on the present appeals. It was argued below, and has been argued here with entire confidence, that the evidence showed, without contradiction, that Dwight was not insured in either of the companies named, in any amount, or on any terms whatever. Should, however, the Court be able to find in the evidence any possible question as to whether or not he was so insured, then the defendant was clearly entitled to the instruction asked in the requests presented under this point. The truth of the answers was warranted by the applicant. If he was not insured in the two companies named, or in either of them, at the time his application was presented to the defendant, then there was a breach of warranty, which, by the agreement between the parties, avoided the policy. Its materiality had been agreed to by the parties, and the Court must give effect to their agreement.

No ground was stated by the Court below for refusing the non-suit on this alleged breach of warranty, but the Court refused to submit any question on this subject to the jury. If the learned judge disposed of this question upon any notion that the companies mentioned were or either of them was to be regarded as having waived the condition that their policies should not take effect until payment of the premium, while the defendant insists that there was no evidence from which an inference could legally be drawn by either the Court or the jury, still if the Court were of a different opinion on that point the question of waiver would have been one of fact for the jury, which the Court could not pass upon without error.

Underwood *vs.* Farmers' Joint Stock
Ins. Co., 57 N. Y., 500.

XXVIII.

THE DEFENDANT WAS ENTITLED TO THE INSTRUCTIONS ASKED FOR IN ITS EIGHTEENTH, NINETEENTH AND TWENTIETH REQUESTS, AND THE REFUSAL OF THE COURT TO CHARGE IN ACCORDANCE WITH THOSE REQUESTS--TO WHICH REFUSAL THE DEFENDANT EXCEPTED SEPARATELY IN EACH CASE--WAS ERROR.

Requests, fols. 2219-2220.

Exceptions, fol. 2222.

These requests called for an instruction to the effect that if Dwight, at the time of the application for the policy in suit, had made application to either the Phoenix Mutual Life Insurance Company, the Connecticut Mutual Life Insurance Company or the Mutual Life Insurance Company of New York, which had not led to an insurance, the plaintiffs could not recover. They were based on Dwight's answer in the negative without qualification to subdivision C of question 6 in the application (Exhibit 21, fol. 2364). This question called upon the applicant to state:

"C. Whether an assurance has been applied for with
 "this or any other company, without having led to an
 "assurance? If so, with which companies? and for
 "what reason did the application not lead to an insur-
 "ance?"

The evidence with respect to the three applications embraced in these requests is collated under the preceding Point I, and was relied on below and is relied on here as entitling the defendant to a nonsuit. If, as we insist, the evidence establishes without contradiction the fact that Dwight had made an application to either of the three companies named, for an insurance upon his life which had not

led to an assurance, then the answer, "No," was untrue, and amounted to a breach of warranty which avoided the policy. If any question as to the fact can be found in the evidence, then the defendant was clearly entitled to the instructions asked for in these requests. The Court will remember that the application to the defendant was forwarded on August 22, 1878. The application to the Phoenix Mutual Life Insurance Company had been forwarded through the agent of that company at Binghamton on August 16, 1878 (Exhibit 114, fol. 2682). At the time of the application to the defendant, the application which had already been presented to the Phoenix was pending and had not led to an assurance. In point of fact, it never did lead to an assurance, but was formally rejected on the 24th day of August, 1878 (Cornwall, fol. 1944).

On August 28th, Dwight, through Hermans—the application to the defendant still being pending—requested by letter an increase of the amount of insurance asked for in the original application, from \$10,000 to \$15,000, or \$20,000 (Exhibit 111, fol. 2677).

Four days prior to this date, the application to the Phoenix Company had been rejected. Assuming, then, what is expressly denied, that the language used in the application would bear the construction contended for by the plaintiffs' counsel, that it did not call for all applications which had not led to an assurance, but only to a specification of actual rejections, in the case of the Phoenix Company, there had been an actual rejection within the knowledge of Dwight, whose agent was representing the rejecting company. The answer, therefore, was untrue in any view that can be taken of the question, on the 28th of August, when the defendant was asked to act upon the application. The failure to call attention to that rejection at this time involved not only a breach of warranty, but an actual fraud which would avoid the contract.

See remarks of Lord Justice Turner in *Traill vs. Baring*, cited under Point I.

XXIX.

THE DEFENDANT'S EXCEPTION TO SO MUCH OF THE JUDGE'S CHARGE REFERRING TO THE TESTIMONY OF EXPERTS AS INSTRUCTS THE JURY AS FOLLOWS:

"YOU HAVE THE RIGHT TO REGARD IT, AND YOU SHOULD REGARD IT WITH GREAT SUSPICION," WAS WELL TAKEN.

Charge, fol. 2154.

Exception, fol. 2199.

The Court will bear in mind that one of the prominent issues was the cause of death of Walton Dwight; whether he died a natural death, or whether his death was suicidal. Upon this question evidence had been introduced, showing the course and history of an alleged illness of Dwight, commencing about the middle of October and terminating on the 15th November, 1878. The history of his last day had been detailed in evidence by Mrs. Owen, including events of the night on which he died, excepting only the period from about half past 9 to 11 o'clock, when Dwight was left alone with the witness, Hull. Evidence also had been given as to the appearance and condition of Dwight's body and the several internal organs thereof, at the autopsy which was held about fifty-eight hours after death. Hypothetical questions based upon this evidence were then put to six ex-

perts of high standing in their profession, as many being called as the ruling of the Court permitted, and these experts unanimously agreed in the conclusions, that it was impossible that Dwight could have died of any natural cause, and that it was also impossible that he could have died of any cause other than asphyxia resulting from mechanical strangulation. No witness on the other side was called to controvert the testimony of the defendant's experts on this subject, nor was any medical witness interrogated by the plaintiffs on the subject of the cause of death, although two of his attending physicians were examined by the plaintiffs; and the Court decided that although under the statute the defendant could not interrogate them as to any facts which came to their knowledge in the course of their professional attendance upon the patient, yet the plaintiffs, standing in the place of Dwight, had the right to interrogate them on that subject. The plaintiffs, on their part, relied on this question on the testimony of Charles A. Hull—as to whose credibility the attention of the Court will be called hereafter—and the testimony of the hotel porter, Lee, which has been referred to heretofore. The defendant's medical experts stood entirely uncontradicted and unimpeached. In this condition of the evidence, the Court instructed the jury in the language to which exception was taken, and which forms the subject of the present point. After commenting upon expert testimony, generally, the learned Judge (at folio 2153) addressed the jury as follows :

“ But, gentlemen, there were two experts, men distinguished in their profession, whose reputation, I assume, is high, who came and testified that during the trial of this cause they had sat here with counsel, suggested subjects for examination, questions to be put to the witnesses by the defendant's counsel. They testified that they had been consulted in advance of this trial, that they had framed questions, consulted with the other experts, and

“ had acted in this capacity in this case. Gentlemen, it is
 “ not the province of this Court to erect a standard by which
 “ to govern or gauge the conduct of members of another
 “ profession, but I do say, that when a witness testifies to
 “ his mere opinion formed in this way, and under such con-
 “ ditions, *you have the right to regard it, and you should re-
 “ gard it, with great suspicion.*”

Having thus, in the most impressive manner, conveyed to the jury the idea that the experts called by the defendant had, in the opinion of the Court, so conducted themselves as to destroy their credibility, the Court proceeded :

“ But, gentlemen, what I say in this respect is not to con-
 “ trol you. You are to judge of the credibility of witnesses
 “ and not the Court, and you have a right, and it is your
 “ duty, to disregard what I have said upon this point, if it
 “ does not accord with your own judgment with respect to
 “ these two witnesses. I ought to caution you that the
 “ strictures which I have made upon these two witnesses
 “ must not affect the defendant’s case in any other respect.
 “ It goes simply to the credibility of these witnesses within
 “ the range of facts or opinions to which they testified. You
 “ cannot take it into account in any other connection than
 “ this ; and you must not allow any opinion that you
 “ may have in respect to these two witnesses, or the position
 “ they occupy, to prejudice the case.”

It is most respectfully submitted that the strictures of the learned Court upon these experts were without foundation. As the learned Court stated, the gentlemen in question were men distinguished in their profession and of high reputation. The circumstances to which the learned Court alluded as impairing their credibility were not susceptible of any such construction. Why, it is respectfully asked, are experts called ? Is it not because they are understood and presumed, from their devotion to a particular branch of science, to be best qualified to decide a question arising in that department of science ? Who but they under-

stand what facts are necessary in order to enable them to arrive at a definite conclusion upon a given question? It becomes necessary, therefore, and has always been considered the province of expert witnesses in the trial of a cause, by suggestions to counsel or otherwise, to elicit from the witnesses called to prove facts such facts as are essential in order to arrive at a conclusion. Hence, experts are universally in the habit of doing the precise things which the learned Court condemns in his instruction to the jury in the case at bar. In order to decide upon the cause of death in a given case, it is necessary that the evidence should show the condition of certain organs, the history of the case. Facts which to one unskilled in the particular department of science might appear of little or no consequence, may be of vital consequence in enabling the expert to reach a conclusion. No inference, therefore, prejudicial to the expert is to be drawn from the fact that he has suggested to counsel the necessary course of investigation to elicit the facts essential to the formation of a correct judgment on the question.

The subsequent remarks of the learned Court to the jury, after he had impressed upon them in the forcible language of his charge their duty in his opinion to regard the testimony of the experts with great suspicion, did not correct the evil. The jury was composed of unlearned men drawn from the vicinage. Many of them were serving on a jury for the first time, and such decided language from the lips of the Court could not fail to be regarded by them as controlling upon their duty, notwithstanding the subsequent statement that the question was one for them. The instruction complained of was not in accordance with the law. It could not fail to affect the defendant's case injuriously upon a vital issue in a cause where the jury were so divided that they were only able to reach a conclusion after being kept together for fifty-two

hours, during which period one of the jurors had been ill and needed the professional attendance of a physician. Even though the Court should be of opinion, which is not anticipated, that the language excepted to was not for any reason the subject of a strict legal exception, the case is brought within the decision of the Court of Appeals in the case of *Hamilton vs. The Third Avenue Railroad Company*, 53 N. Y., 25, cited under Point III, where the Court say :

“ The further duty was incumbent upon them ” (the General Term) “ to examine whether, upon the trial, the defendant sustained any injury from the jury having been misled by any improper remarks of the Judge during the trial which were not excepted to, or not the proper subject of exception ” (p. 27).

Surely it cannot be controverted that the remarks of the Court on the subject of these experts, to which attention has been called, were improper, and had a tendency to mislead the jury, and, whether a strict exception would lie to these remarks or not, under the law of this State as laid down by the Court of Appeals, the verdict should be set aside for that reason, if for no other.

XXX.

THE DEFENDANT WAS ENTITLED TO THE FOLLOWING INSTRUCTION ASKED FOR IN ITS TWENTY-THIRD REQUEST (FOL. 2221), VIZ. :

“ TWENTY-THIRD.—THAT IN WEIGHING THE TESTIMONY OF A WITNESS THE JURY ARE ENTITLED TO TAKE INTO CONSIDERATION ON THE QUESTION OF HIS CREDIBILITY HIS OWN DECLARATIONS AS TO HIS BELIEF OR UNBELIEF IN THE EXISTENCE OF A GOD, AND A FUTURE STATE OF REWARDS AND PUNISHMENTS.”

The Court refused to charge as requested, or to give any other instruction on this subject than was embraced in the charge actually delivered. The defendant duly excepted to the refusal of the Court to charge as requested, and to each and every portion of the charge actually delivered, so far as the same was in conflict with such request; and also separately and specifically to that portion of the charge which instructed the jury, that

“ If the witness recognizes the obligation of the oath under the law, and recognizes its moral obligation, and believes that the oath or affirmation which he takes binds his conscience to testify the truth, and that moral penalties will follow in case of failure, these are the only considerations to be taken into account as affecting his credibility in this connection.”

Exceptions, fols. 2199 and 2222.

The instruction actually given to the jury on the subject of the question embraced in this point will be found commencing at fol. 2156.

The Court will observe that it was not claimed that the witness was not a competent witness by reason of his unbelief. No point whatever was

made on the subject of his competency. All that the request under consideration asked for was that the jury should be advised that in weighing the testimony of a witness they were entitled to take into consideration on the question of his credibility, of which they were the admitted judges, his own declarations as to his belief or unbelief in the existence of a God and of a future state of rewards and punishments. The attention of the Court has been called in the preceding point to the vital character of the issue as to the cause of Dwight's death. On one side of this issue was arrayed the whole body of expert witnesses, who were unanimous in their judgment as to the cause of death. On the other side of this issue stood Charles A. Hull. He had admitted on the stand that he could not say he believed the Holy Scriptures to be anything more than the work of a mere man (fol. 1258); that he doubted very much whether the Scriptures were inspired; that he did not believe in the existence of a personal God (fol. 1260); that he had no fixed belief in any overruling power that rewards and punishes aside from those punishments inflicted in this world (fol. 1260); that he had no well-defined belief on the subject (fol. 1262).

Under the law as it formerly existed, the witness would have been incompetent. Under the amended constitution of this State the objection on the ground of incompetency has been removed. The state of the witness' mind on these topics, however, is one which the jury have the right to take into consideration on the question of his credibility. That it may be taken into consideration on the question of his credibility, where it does not affect his competency, has been decided over and over again.

Hunscom vs. Hunscom, 15 Mass., 184.

Wakefield vs. Ross, 5 Mason, 16, and cases cited.

Commonwealth vs. Burke, 16 Gray, 32.

In the case of the people against Matteson, referred to in a note to *Butts vs. Swartwood*, 2 Cowen, 431, Judge Walworth (p. 433) laid down the rule as follows, distinguishing between objections to the competency and matters which go to the credibility of the witness :

" I apprehend the true test of the competency of a witness to be this: Has the obligation of an oath any binding tie upon his conscience? Or, in other words, does the witness believe in the existence of a God, who will punish his perjury? If he swears falsely, does he believe he will be punished by an overruling Providence, either in this world or the world to come? If he does not believe in the existence of a God, or if he believes in no punishment except by human laws, no obligation or tie can have any binding force upon his conscience. But if he believes that he will be punished by his God, even in this world, if he swears falsely, there is a binding tie upon the conscience of the witness, and he must be sworn, and the strength or weakness of that tie is only properly to be taken into consideration, in deciding upon the degree of credit which is to be given to his testimony. It is a question as to his credibility and not as to his competency."

Later on, in the same opinion, Judge Walworth refers to the case of *Omichund vs. Barker*, reported in Willes' Reports, and quotes Chief Justice Willes, as follows :

" Suppose an infidel, who believes a God, and that he will reward or punish him in this world, but does not believe a future state, be examined on oath, as I think he may; and, on the other side, to contradict him, a Christian is examined, who believes a future state, and that he shall be punished in the next world as well as in this, if he does not swear to the truth, I think that the same credit ought not to be given to the infidel as to the Christian, because he is plainly not under so strong an obligation."

Judge Walworth then continues :

" Such I understand to be the common law of England

“ as it existed at the time of our revolution, and which,
 “ by the Constitution, is made the law of this State. And
 “ this is not a hasty opinion formed during the trial of this
 “ cause, but from having examined the subject heretofore.
 “ In this opinion I believe, also, I am supported by most, if
 “ not all, of the Circuit Judges.”

As has been stated the jury are the sole judges of the credibility of a witness. In weighing his credibility they have a right to take into consideration his demeanor upon the stand, his hesitation or promptness in answering questions propounded to him, his apparent frankness or lack of frankness in the answers he makes, his manner of testifying. Shall it be said, that in the State of New York, we have reached that point in so-called liberalism, that in weighing the testimony of witnesses where there is a conflict, the jury are not entitled to give more credit to one who believes in the existence of a God and of a future state of rewards and punishments, who believes that if he testifies falsely upon the stand he will have to give an account of his perjury before an omnipotent and omniscient Judge, than they will give to another who confessedly has no belief in the existence of a God or of a future state, and who testifies, therefore, free from the restraints which bind the conscience of the other? It is respectfully submitted that that is not the law of this State, and that the jury are entitled to take into consideration, in weighing the credibility of a witness, his sworn belief or disbelief on these subjects. The Court, therefore, erred in refusing to give the instruction asked for, and in the instruction actually given to the jury upon this subject, to which exceptions were taken.

XXXI.

THE COURT ERRED IN INSTRUCTING THE JURY IN SUBSTANCE THAT THE FAILURE OF THE PLAINTIFFS TO SWEAR AS A WITNESS THE HOTEL KEEPER, SPAULDING, COULD NOT BE THE SUBJECT OF UNFAVORABLE PRESUMPTIONS AGAINST THEM, AND THE DEFENDANT'S EXCEPTION TO SUCH INSTRUCTION WAS WELL TAKEN.

Charge, fol. 2114.

Exception, fol. 2198.

The evidence showed that from half-past nine to eleven o'clock, on the 15th November, Hull was alone with Dwight; that at about eleven o'clock he knocked at Mrs. Dwight's door, and that she immediately followed into her husband's room. Mrs. Owen followed within five minutes. She never saw Dwight give any sign of life after reaching the room on that occasion. The evidence showed that there were present at that time Spaulding, who had hold of Dwight's tongue, and the plaintiff, Mrs. Dwight, who had his hands in hot water. If any one but Hull could throw any light upon the circumstances of Dwight's death, it was Spaulding or Mrs. Dwight. The circumstances of Spaulding holding Dwight's tongue was itself a suspicious one. He was the host, friend and attendant of Dwight on this occasion. The learned Judge told the jury in another place (fol. 2126), that the plaintiffs produced in support of their theory of a natural death the persons who were about his death bed. They did not produce either Spaulding or Mrs. Dwight, and under these circumstances, in view of the relation of Spaulding to the plaintiff and her husband, it is respectfully submitted that it is an error to say that no presumption unfavorable to the plaintiffs could be drawn from the non-production of Spauld-

ing as a witness. The exception to this instruction was therefore well taken.

XXXII.

THE DEFENDANT IS THEREFORE ENTITLED IN ANY EVENT, BOTH ON THE FACTS AND THE LAW, TO HAVE THE JUDGMENT AND ORDER APPEALED FROM REVERSED, AND THE VERDICT AND FINDINGS OF THE JURY SET ASIDE AND A NEW TRIAL ORDERED ; AND, AS THE DEFENDANT WAS ENTITLED TO A NON-SUIT OR DIRECTION FOR A VERDICT IN ITS FAVOR ON THE UNCONTRADICTED EVIDENCE ESTABLISHING BREACHES OF WARRANTY WHICH BY THE EXPRESS TERMS OF THE CONTRACT RENDERED THE POLICY VOID, AND AS IT IS MANIFEST THAT NO BENEFIT COULD RESULT TO THE PLAINTIFFS FROM A NEW TRIAL, IT IS RESPECTFULLY SUBMITTED THAT, UNDER THE RULES APPLICABLE TO SUCH CASES, THE COMPLAINT SHOULD NOW BE DISMISSED WITH COSTS.

JOS. LAROCQUE,

Of Counsel for Appellant.